United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

74-2324

(41820)

United States Court of Appeals

FOR THE SECOND CIRCUIT

LUMUMBA SHAKUR, et al.,

Plaintiffs-Appellees,

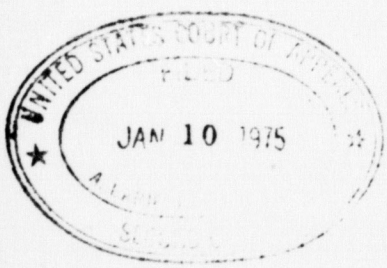
v.

GEORGE F. MCGRATH, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



ADRIAN P. BURKE
Corporation Counsel of
The City of New York
Attorney for Defendants-Appellants
Municipal Building
New York, New York 10007
566-4510

ERIC SCHNAPPER, Esq.
Attorney for Plaintiffs-Appellees
10 Columbus Circle
New York, New York 10019
586-8397

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Docket Entries.

DATE	PROCEEDINGS
Oct 14, 69	Filed complaint and issued summons.
Oct 14, 69	Filed Notice of Assignment
Nov /10/69	Filed summons and return Served Commissioner of Correction Geo. McGrath by Mr. Latham on 10/15/69.
Dec /3/69	Filed Defts notice of motion ret. 12/7/69 re more definate statement.
Dec /3/69	Filed defts memorandum of law in support of motion.
Dec /5/69	Filed Pltffs amended complaint.
Dec. 8–69	Filed Notice of Motion re: desist segregated security conditions. Ret. 12/16/69 at 10:00 a.m.
Dec. 17–69	Filed Notice of Appearance for deft. Frank S. Hogan, DA. New York County. and ANSWER
Dec. 19–69	Before Tyler, J. Hearing begun on plaintiffs motion for temporary injunction.
Dec. 22–69	Hearing continued and concluded. Memo. and order to be submitted.
Dec. 31–69	Filed affidavit of George F. McGrath in opposition to motion for preliminary injunction.
Dec. 31–69	Filed memorandum in support of motion for preliminary injunction.
Dec. 31–69	Filed defts' supplemental memorandum of law.
Dec. 31–69	Filed memorandum of law in opposition to pltff's motion for preliminary injunction.
Dec. 31–69	Filed affidavit of Joseph A. Phillips in opposition to motion for preliminary injunction.

Docket Entries.

DATE	PROCEEDINGS
Dec. 31–69	Filed affidavit of Anthony Principe.
Dec. 31–69	Filed application of Dr. Curtis Powell for leave to proceed in forma pauperis.
Dec. 31–69	Filed Memorandum Opinion #36436—Findings of fact respecting pltffs' motion for injunction pendente lite. Accordingly, pltffs' modified motion for a temporary injunction is granted, as indicated. Pltff. Powell applied pro se for various relief including a writ of prohibition restraining further proceedings in Supreme Court—N.Y. and for a writ of habeas corpus, etc. An order should be settled reflecting the disposition of the motion for temporary injunction as aforesaid. Included in this order should be a disposition of the pro se motions of pltff. Powell. Tyler, J.
Jan. 26–70	Filed Notice of Settlement and Order. Ordered that plaintiffs as indicated shall be transferred on 12/29/69 to the Branch Queens House of Detention for Men, and housed together as indicated, etc. etc.; shall be permitted to confer with counsel as indicated, etc.; Ordered that all plaintiff Curtis Powell's pro se applications, except as is hereinabove provided, are hereby denied. Tyler, J. (mailed notice)
Jul 10–70	Filed Notice of Appearance for plaintiffs.
Jul 10–70	Filed Notice of Motion re: Add parties. Ret. 7/21/70.
Jul 17–70	Filed order that pltff's are granted leave to file amended complt & P. Cafaro, A. Accocella, A. Principe, F. Rieber, R. Plew, J. Dieselhurst, Dr. Collins are to be added as parties to this action & caption amended accordingly — pltff's to filed amended complaint within 20 days — Tyler, J m/n

Docket Entries.

DATE	PROCEEDINGS
Jul 17–70	Filed MEMO. END. on motion papers filed 7/10/70. Motion disposed of as indicated at argument today. Order as agreed upon to be submitted. Tyler, J.
Jul 21–70	Filed Order that the State of New York is made a party defendant to this action and the complaint is amended accordingly without prejudice however to a motion to dismiss for lack of jurisdiction by the State of New York, etc. Tyler, J.
Jul 21–70	Filed Memorandum of Law on behalf of deft. Dist. Attorney NY County. in opposition
Jul 29–70	Filed pltffs' second amended complaint—additional summons issued
Jul 31–70	Filed Traverse Opposition.
Jul 30–70	Issued additional summons.
Aug. 3–70	Filed ANSWER of deft. Frank S. Hogan to second amended complaint.
Sep. 18–70	Filed Deft's (State of New York) notice of motion to dismiss second amended complaint.
Sep. 18–70	Filed memo-endorsed on deft's motion: Motion to dismiss the amended complaint as against deft. State of New York is granted upon the subjoined consent dated Sept. 14, 1970. of the pltff's counsel. So ordered. Tyler, J.
Sep. 18–70	Filed deft's State of New York memorandum of law in support of motion.
Nov 9–70	Filed additional summons & return—Unable to serve Pasquale A. Cafaro.

Docket Entries.

DATE	PROCEEDINGS
Nov 9–70	Filed additional summons & Marshal's return—Served Angelo Accocella by himself on 9-23-70; Served Anthony Principe by Mr. Roberts on 7-31-70; Served John Diesel Service not completed; Served Ralph V. Plew M.D. by Mr. Roberts on 7-31-70; Served "John" Collins, M.D. by James Collins on 8-1-70; Served State of NY by Irving Rollins on 7-31-70; Served Frederick Reiber—Service not completed.
Nov. 10–70	Filed defts' McGrath, Principe, Accocella, Plew and Collins ANSWER to the Second Amended Complaint.
Jun 4–71	Issued add'l summons.
Jan 4–72	Filed MEMORANDUM AND ORDER. The motions of the City defts, as heretofore enumerated are denied in their entirety. Defendant Hogan's motion for summary judgment is continued in part and granted in part. Plaintiffs' interrogs., with the above noted exceptions, are quashed, as indicated. Tyler J. M/n
Jan 4–72	Filed memorandum of law on behalf of deft Frank S. Hogan.
Jan 4–72	Filed deft Hogan notice of motion. Re: Judgment of pleadings.
Jan 4–72	Filed memorandum of law in opposition to defts' motions to dismiss second amended complaint.
Jan 4–72	Filed deft's supplemental memorandum.
Jan 4–72	Filed affidavit in opposition to deft Hogan's motion for summary judgment.
Jan 13–72	Filed interogs. to defts' Hogan and McGrath.
Jan 21–72	Filed Answer of deft /Frank /S. Hogan, to pltff's interrogs.

Docket Entries.

DATE	PRJCEEDINGS
Jan 20–72	Filed ANSWER of Distlehurst to the second amended complaint.
Jan 20–72	Filed deft John Distlehurst demand trial by jury.
Jan 26–72	Filed certain defts. Answers to Pltffs. Interrogatories.
Jan 26–72	Filed answers to interrogatories by deft. McGrath.
Mar 7–72	Filed pltffs affidavit in opposition to deft Hogan's motion for summary judgment.
Mar 7–72	Filed MEMORANDUM OPINION #38303 Hogan's motion for summary judgment dismissing all claims against him is granted. While it is true that civil rights pleadings are to be construed so far as is possible in favor of pltffs, quite different considerations pertain where plaintiffs, represented by counsel of their choice in a litigation spanning the better part of two years, cannot produce one fact tending to show liability on the part of the defendant moving for summary judgment. So Ordered. Tyler J. —mailed notice.
Mar 9–72	Filed JUDGMENT. Ordered that the deft, District Attorney of New York, Frank S. Hogan, have judgment against the plaintiffs, Lumumba Abdul Shakur, et al dismissing all claims in the complaint as to him only. Tyler J. Judgment ent. 3-8-72 Clerk. ent. 3-10-72 —mailed notice.
Mar 22–72	Filed MEMORANDUM AND [illegible] Accordingly, he is invited to reque[illegible]rence of all counsel before the und[illegible]d on Friday morning, March 31, 19[illegible]1:30 A.M. to apply for additional discovery. The request should be made simply by telephone to the chambers of the undersigned. So Ordered. Tyler J. —mailed notice.

Docket Entries.

DATE	PRJCEEDINGS
Mar 22–72	Filed letter of Jonathan Shapiro, to Judge Tyler.
Jun 29–72	Filed deft., Pasquale A. Cafaro, demand for jury trial.
Jun 29–72	Filed ANSWER of deft Cafaro, to the complaint.
Feb. 8–73	Filed Pltffs objections to defts interrogatories.
May. 16–74	Filed Memorandum & order that the court is in receipt of letters from both sides of this 1969 case. The Following rulings are being made, subject to modification in the hope of expediting the long-overdue trial of this action. The court suggests that parties be ready, for trial the week of June 10, 1974. Should our calendar not permit, trial that week, (as we will be sitting in Part I), another date, will then be fixed, hopefully in july. So ordered. Knapp, J. m/n
Jul. 8–74	Filed pltff's notice of motion Re: medical malpractice ret. 7-18-74.
Jul. 8–74	Filed pltff's memorandum in support of his motion ret. 7-18-74.
Jul 23–74	Filed Defts. Memorandum of Law.
Aug. 5–74	Filed Memorandum and Order. Although pltffs may in theory have an excellent S1983 claim against physicians, it has been represented to me that such defts are practically judgment proof and any assets receivable from them would not pay expense of litigation. City is therefore the only viable target, and a reversal of ruling would therefore bring lawsuit to an end. Accordingly an immediate appeal "may materially advance ultimate termination of litigation. So Ordered & So Certified. Knapp, J. (mn)

Order With Leave to Appeal.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of October, one thousand nine hundred and seventy-four.

LUMUMBA SHAKUR, et al.,

Plaintiffs-Appellees,

v.

GEORGE F. MCGRATH,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the petitioner dated August 9, 1974 for leave to appeal pursuant to 28 U.S.C. 1292 (b) and Rule 5 of the Federal Rules of Appellate Procedure be and it hereby is granted.

LEONARD P. MOORE
WALTER R. MANSFIELD
JAMES L. OAKES,
Circuit Judges

:8FU(F(

Memorandum and Order by Knapp, J., dated May 15, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

KNAPP, D.J.

The Court is in receipt of letters from both sides of this 1969 case. The following rulings are being made subject to modification in the hope of expediting the long-overdue trial of this action.

1. Any claim based on ordinary malpractice is barred by § 50-d(2) of the N.Y. General Municipal Law. See *Derlicka* v. *Leo* (1939), 281 N.Y. 266.

2. Insofar as plaintiffs' claims rests on inadequate medical care rising to the level of violations of § 1983, such claims are not barred by failure to comply with § 50-d(2).

3. Defendant-physicians would not be entitled to indemnity from the City of New York should they be found liable under § 1983.

The Court suggests that the parties be ready for trial the week of June 10, 1974. Should our calendar not permit trial that week (as we will be sitting in Part I), another date will then be fixed, hopefully in July.

SO ORDERED.

Dated: New York, New York, May 15, 1974.

WHITMAN KNAPP
U.S.D.J.

Memorandum and Order, Knapp, J., dated August 1, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

JACK GREENBERG
ERIC SCHNAPPER
Attorneys for Plaintiffs
ADRIAN P. BURKE
Corporation Counsel

By: Adrian P. Burke
Thomas F. Birchill,
Of Counsel

KNAPP, D.J.

As we construe the complaint, as it has survived previous motions, it contains two causes of action. First, the complaint states a federal claim under § 1983 against various city corrections officials and certain physicians employed in city institutions. Second, it asserts a pendent claim for malpractice against the physicians and the city. The Corporation Counsel, appearing for the city officials and the physicians, moves to dismiss the pendent malpractice claim. For the reasons that follow, that motion is denied.[1]

Here controlling are §§ 50-d and 50-e of New York's General Municipal Law. Those motions do two things vital to this lawsuit. § 50-d provides that if the plaintiffs have com-

[1] This decision obviously supersedes my first tentative finding of May 15, 1974.

plied with the notice provisions of § 50-e two things will follow: (a) plaintiffs may maintain their action against the physicians, and (b) the city must indemnify the physicians with respect to any liability plaintiffs may establish against them. However, the result of plaintiffs' failure to comply with such notice provisions would not only defeat the physicians' claim for indemnification against the City, but would absolve the physicians from all liability for malpractice. See *Derlicka* v. *Leo* (1st Dept. 1940) 259 App. Div. 607, 19 N.Y.S. 2d 949, *aff'd.* 284 N.Y. 707, 31 N.E. 2d 47. The crucial question, therefore, is: Have plaintiffs complied with the notice provisions of § 50-e?

So far as here relevant, § 50-e provides that notice must be served within 90 days and that

> "2. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.
>
> 3. The notice shall be served on the party against whom the claim is made by delivering a copy thereof, in duplicate, personally, or by registered mail, to the person, officer, agent, clerk or employee, designated by Law as a person to whom a summons in an action in the supreme court issued against such party may be delivered; provided that if service of such notice be made within the period prescribed by this Section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed

> valid if such notice is actually received by such person, officer, agent, clerk or employee and such party against whom the claim is made shall cause the claimant or any other person interested in the claim to be examined in regard to such claim."

Plaintiffs have established that they served the complaint in this action within 90 days; that such complaint was properly served upon a person "authorized by law" to receive the same, that it was under oath and contained all the information specified in paragraph 2 above, and that the city has examined various persons in connection therewith. We therefore find that substantial compliance with the statute has been established.

The Corporation Counsel cites *P. J. Panzeca, Inc.* v. *Board of Education, et al.* (1971), 29 N.Y. 2d 508, 323 N.Y.S. 2d 978, for the proposition that the filing of a complaint in a lawsuit—even though within the 90-day period—cannot be deemed a substitute for a formal notice of claim. That case, however, arose under § 1813 of New York's Education Law, and is not applicable to the facts at bar. So far as here relevant, Education Law § 3813 provides:

> "No action or special proceeding, for any cause whatever, except as hereinafter provided * * * shall be prosecuted or maintained against any * * * board of education, * * * unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such motion or special proceeding is founded was presented to the governing body of said district within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an ad-

justment or payment thereof, for thirty days after each presentment."

It is readily apparent that the foregoing language is wholly different from the controlling language in § 50-a of the General Municipal Law, § 50-e has no requirement that the complaint which ultimately starts the lawsuit allege neglect or refusal by an officer empowered to act; and § 3813 makes no provision for substantial compliance. The *Panzeca* case therefore is not here applicable.

In closing, we note that plaintiffs have made several arguments which we reject. Plaintiffs argue that if § 50-e should be construed in such a manner as to defeat their claim such construction would violate due process. There is no merit to such contention. § 50-e has no bearing whatever upon plaintiffs' federal claim, and it cannot successfully be contended that the state may not condition the prosecution of a state tort action by reasonable notice provisions.

Plaintiffs further contend that the time for giving notice does not commence to run until after judgment has been obtained against the physicians when, so the argument goes, the City's obligation to indemnify will first arise. This argument overlooks the doctrine of *Parlicka* v. *Leo, supra* which provides that failure to give timely notice defeats the claim against the physicians as well as against the City.

The Corporation Counsel's motion to dismiss the complaint insofar as it alleges a pendent claim for malpractice is accordingly denied.

This decision seems peculiarly appropriate for certification to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). There is, in the first place, a substantial ground for difference of opinion as to the correctness of the rul-

ing made. Moreover, although the ruling technically affects only half of the lawsuit, in the real world a contrary ruling would dispose of the entire lawsuit. Although plaintiffs may in theory have an excellent § 1903 claim against the physicians, it has been represented to me that such defendants are practically judgment proof and that any assets receivable from them would not pay the expenses of litigation. The City is therefore the only viable target, and a reversal of this ruling would therefore, as a practical matter, bring the lawsuit to an end. Accordingly an immediate appeal "may materially advance the ultimate termination of the litigation."

SO ORDERED AND SO CERTIFIED.

Dated: New York, New York, August 1, 1974.

WHITMAN KNAPP
Whitman Knapp, U.S.D.J.

Notice of Motion, dated July 3, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that, on the complaint and previous proceedings herein, the undersigned will move this Court on July 18, 1974, at 9:00 a.m., or as soon thereafter as counsel can be heard, for an Order providing that, if defendants Ralph V. Plew, M.D. or "John" Collins, M.D. are adjudged liable to plaintiff Lee Berry for damages resulting from either (a) medical malpractice, or (b) medical malpractice under such circumstances or with such motivation as to constitute a violation of plaintiff Berry's federally protected rights, the City of New York shall be liable to indemnify said defendants, pursuant to section 50-d, General Municipal Law.

Dated: New York, New York, July 3, 1974.

Yours, etc.,

JACK GREENBERG
ERIC SCHNAPPER
Counsel for Plaintiffs

To: ADRIAN P. BURKE
THOMAS F. BIRCHILL
Assistant Corporation Counsel

Plaintiffs' Memorandum.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs Lee Berry, et al., submit this memorandum in support of their motion for an order declaring that the City of New York will be liable to indemnify defendants Ralph V. Plew or "John" Collins if either defendant is adjudged liable to plaintiff Lee Berry for (a) medical malpractice or (b) medical malpractice under such circumstances or with such motivation as to constitute a violation of plaintiff Berry's federally protected rights.

Introduction

This action arose in 1969 out of the arrest and incarceration of the 12 plaintiffs on state charges of criminal conspiracy and related criminal acts. The original complaint sought damages and injunctive relief because of the conditions under which plaintiffs were confined in various New York City jails, and because of the inadequate medical attention given plaintiff Berry. As a result of previous litigation in this matter, most of the prison conditions of which plaintiffs complained were ultimately ordered; in any event, the issue of injunctive relief was rendered moot on May 13, 1971, when a state jury acquitted plaintiffs of all the criminal charges which led to the imprisonment from which this action arose. The issue of damage remains.

The named defendants in this action are all individual correction officials or doctors. The City of New York is not a defendant, although the individual defendants in this

action have been and are represented by the city Corporation Counsel. State law provides, however, that under circumstances the city must indemnify doctors in its employ if they are held liable for malpractice in connection with work at a city institution. The parties are in disagreement as to whether New York City faces such potential liability in this case. Ordinarily the question of indemnification would not be resolved by this Court, if at all, until the merits of the case had been tried and determined.

In this case, however, the question of indemnification will clearly control the course and outcome of the litigation. The Complaint seeks damages in the amount of $500,000 for plaintiff Berry, the alleged victim of inadequate medical treatment, and $100,000 for each of the other plaintiffs. None of the defendants have personal funds or assets amounting to more than a fraction of these amounts, and counsel for defendants has represented that none of the defendants have any insurance applicable to their conduct in this case. Manifestly little would be achieved by a trial on the merits against defendants who are, in comparison to the sums sought, judgment proof. Plaintiffs have indicated they would not seek to pursue this litigation further so long as there is no significant possibility that success on the merits would result in damages in the amount sought. If, on the other hand, the City of New York is liable to indemnify the defendant doctors for their alleged mistreatment of plaintiff Berry, a judgment for that plaintiff in the amount sought would in fact be enforceable. Moreover the parties have indicated to the Court that, were there a final determination of such liability for indemnification, there is a substantial probability that the City would reach an appropriate settlement with plaintiff Berry, and that the other aspects of the litigation would be discontinued.

Accordingly the ultimate termination of this litigation will be materially advanced by a decision as to whether,

should defendants Plew and Collins be adjudged liable on the merits, the City of New York would be obligated to indemnify them.

Facts

The allegations regarding plaintiff Berry are as follows. Lee Berry, prior to, during, and subsequent to the events from which this action arose was an epileptic subject to serious, and potentially fatal, grand mal seizures. On April 2, 1969, when he was indicted along with the other plaintiffs, Mr. Berry was in the Veterans Administration Hospital in New York being treated for epilepsy. Mr. Berry was so severely handicapped by the disease that he was receiving a 70% permanent disability pension from the Army. The next day Mr. Berry's mother called him at the hospital and told him the police were looking for him. Mr. Berry voluntarily telephoned the police and told them where he was. Berry was immediately arrested, removed from the hospital, and incarcerated in the Manhattan's Men's House of Detention (the "Tombs"). Despite his illness and voluntary surrender, Mr. Berry's bail was set at $100,000.

From April to July of 1969, plaintiff Berry, despite his repeated requests, was denied both medication and the assistance of a physician. Beginning July 1969, as the result of a court order, Berry received some limited medication, but his condition continued to deteriorate. During the period from his arrest until November, 1969, when he was transferred to Bellevue Hospital, plaintiff had an average of two epileptic seizures a week, frequently waking in a pool of blood. On July 22, after being beaten by a guard, he was placed in solitary confinement and thereafter denied most of his medication.

On November 24, 1969, again pursuant to a court order, plaintiff was transferred to the prison ward at Bellevue Hospital. He quickly developed a high fever and was semi-

comatose for almost a month. On December 25 he developed severe cramps, and the next day his appendix was removed. The pathologist subsequently found that there was nothing wrong with the appendix. As a result of the operation he developed severe pneumonia and clotting of the blood in the groin area. On January 9, 1970, he was operated on for this latter condition. Later in January Berry was found to have an abscess in his lung.

On March 11, 1970, without advance notice, plaintiff was transferred to the Riker's Island Prison infirmary. No medical records accompanied his transfer, and all medication was discontinued. Armed with yet another court order, Berry's physician, Dr. Cordice, visited him at Riker's Island and diagnosed a potentially fatal thrombosis in Berry's left leg. On March 19 Berry was transferred back to Bellevue Hospital. On April 23, 1970, pursuant to a writ of habeas corpus, Berry's bail was reduced to $5,000 and he was released to undergo private medical treatment. Berry's prosecution was severed from the other defendants when he proved too ill to stand trial, and all charges against him were dismissed after the acquittal of the other defendants. The damage produced by the year in which Berry was imprisoned, including the aggravation of his epilepsy and a thrombosis in his left leg, appear to be permanent.

Plaintiff asserts that the inadequacy of the above described medical treatment gives rise to a cause of action for malpractice, over which this Court has pendant jurisdiction. Plaintiff also asserts that such malpractice constituted a violation of his federally protected rights, both because it occurred while he was imprisoned and because it was motivated by and sanctioned because of a desire to punish him for crimes of which he was not, and never has been, convicted.

Plaintiffs' Memorandum.

The Doctors Are Entitled to Indemnification for Malpractice Since Plaintiff Gave Adequate Notice Under Section 50-d, General Municipal Law

Section 50-d of New York's General Municipal Law provides that no action may be maintained for malpractice against a physician or city for free treatment in a public institution unless the plaintiff has served a notice of claim in compliance with Section 50-e. Section 50-e sets forth four basic requirements regarding this notice of claim (1) It must be given within 90 days after the claim arises (2) It must be in writing and sworn to by or on behalf of the claimant (3) It must be delivered to the person on whom a summons may be served, the defendant or his counsel (4) It must disclose the name and address of the claimant and his attorney, the nature of the claim, the time, place and manner in which it arose, and the item of damages claimed. Beyond this no particular form may be used; indeed, the city of New York does not even print a "Notice of Claim" form for use by claimants.

In a malpractice action the claim does not "arise" until the program of mistreatment has been completed. In *Borgia v. City of New York,* 237 N.Y.S. 2d 319 (1962) the claimant had been subject to continuous treatment in city hospitals from October 10, 1956 to February 18, 1958. The Notice of Claim was filed on April 18, 1958, within 90 days of the end of treatment, but more than 90 days after the several negligent acts complained of. The City moved to dismiss the action on the ground the Notice of Claim was untimely, but the Court of Appeals upheld the action,

> We held that at least when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the "accrual" comes only at the end of the treatment.

237 N.Y.S. 2d at 319, 12 N.Y. 2d 151, 155. The same rule has ben expressly upheld by the Supreme Court in both New York and Kings Counties. *Armstrong* v. *City of New York,* 240 N.Y.S. 2d 663, 39 Misc. 2d 445 (1963); *Figuerra* v. *City of New York,* 106 N.Y.S. 2d 430, 431 (1951).

In the instant case the period of Berry's treatment ran from his arrest on April 3, 1969, to his release from Bellvue Hospital on April 23, 1970. The ninetieth day from the end of this period was July 22, 1970. Prior to July 22, 1970, the defendant physicians or their attorneys the New York City Corporation Counsel, received from claimant at least five documents each of which constituted substantial compliance with section 50-e: the original complaint, filed October 14, 1969; the first amended complaint, filed December 5, 1969; the motion to amend the complaint, filed July 10, 1970; the affidavit of Berry's counsel, Harold Rothwax, Esq., dated April 1970; and the affidavit of Berry's doctor, Dr. John Cordice, dated April 6, 1970. Each of these documents was in writing, was served on the appropriate party within the required 90 days, and gave the name and address of claimant, the nature of the claim, its origin, and the nature of the damage. Two of these documents, the affidavits of Attorney Rothwax and Dr. John Cordice were under oath.

State law did not require, or could constitutionally require, any more than this. The purpose of the Notice of Claim is to put the City on notice of the claim while the evidence is still fresh. *Sandak* v. *Tuxedo Union School District,* 308 N.Y. 226, 124 N.E. 2d 295 (1954) New York City does not and cannot claim that, on its behalf or as attorney for the physician defendants, it did not have full notice of the claim prior to July 22, 1970. On the contrary, New York had on that date been deeply involved for over 9 months in litigation regarding Berry. It had

already been subject to several court orders to correct inadequate medical treatment being given to plaintiff. For six months after the filing of the notice Berry had been imprisoned and completely subject to the control of New York City any time it wished to examine him. That Berry was actually examined by doctors for the City numerous times throughout this period cannot be denied.

Since plaintiff sued under 42 U.S.C. § 1983, he was able to commence this action without first filing a notice of claim. It cannot seriously be contended that plaintiff was required, in order to pursue his pendant state claim, to serve defendants with a second copy of the complaint under the heading "Notice of Claim" and then refile the identical complaint with this Court 30 days later. See section 50-i (1)(b), General Municipal Law. Not since the abolition of common law pleading a century ago have substantive rights depended upon the performance of such meaningless rituals. On the contrary, section 50-e(6) provides that any such defects of mere form shall not control

> Anytime after the date of service of notice of claim and at or before the trial of an action or the hearing upon a special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defeat made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied, or disregarded, as the case may be, in the discretion of the court provided it shall appear that the other party was not prejudiced thereby.

Section 50-e(3) also provides that defects in the manner of service may also be disregarded. At least so long as defendants had actual timely notice of Berry's claim, which they undeniably had, any questions regarding the form of such notice are entirely procedural under *Eric R.R.* v.

Thompkins, 304 U.S. 64 (1938). Federal law requires no more than was done. Certainly defendants, having received actual and adequate notice of this claim before July, 1970, have long ago waived any right they may have had to object to the form of that notice.

Accordingly plaintiffs complied with the notice provisions of the General Municipal Law and the defendant doctors, being subject to suit for malpractice, are entitled to indemnification from New York City.

The Doctors Are Entitled To Indemnification For Any Judgment Obtained for A Violation of 42 U.S.C. § 1983

Plaintiffs claim that the conduct of the defendant doctors constitutes more than mere malpractice, and rises to the level of a violation of § 1983. It is well established that in a section 1983 action the provisions of the General Municipal Law do not apply to plaintiffs claim. A similar question arose in *Willis* v. *Reddin,* 418 F 2d 702 (9th Cir. 1969), where plaintiff claimed he had been robbed by four police officers who wished to prevent him from making bail because of his race. The California Tort Claims Act required that, before any suit against a public official, the claimant first file a notice of that claim, a procedure which plaintiff had not followed. The Ninth Circuit nonetheless upheld the action

> While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions upon them. Were the requirements of the Tort Claims Act nothing more than procedural limitations we would in fashioning the remedial details applicable to the federally created right involved here,

> determine whether the California courts would apply the requirements of that Act, under the interpretations of the California courts, condition the right, we think it would be singularly inappropriate to fashion a federal procedural detail by any reference to it.

418 F. 2d at 704-705.

Section 50-d requires indemnification for a doctor held liable in a § 1983 action such as this. Plaintiff would establish a § 1983 cause of action in this case by establishing that the doctors were guilty of malpractice and either (a) that said malpractice occurred under color of law while plaintiff was in prison, or (b) that said malpractice occurred under color of law and with the intent to punish plaintiff. See *Hughes* v. *Noble*, 295 F. 2d 495 (5th Cir. 1961); *Coleman* v. *Johnston*, 247 F. 2d 273 (7th Cir. 1957); *Haigh* v. *Snidow*, 231 F. Supp. 324 (S.D. Cal. 1964); *McCallum* v. *Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955). Under either § 1983 theory, it would be necessary for plaintiff to establish as part of his case that the defendant doctors were guilty of malpractice. Section 50-d requires indemnification in *all* cases of malpractice:

> every municipal corporation shall be liable for, and shall assume the liability, to the extent it shall save him harmless, of any . . . physician . . . for damages for personal injuries alleged to have been sustained by such person by reason of the malpractice of such . . . physician . . . .

The statute is not limited to malpractice other than on prisoners, or malpractice with a lofty motive—its language covers liability deriving from malpractice under any circumstances in a public institution.

The purpose of section 50-d is to encourage physicians and other medical personnel to work at public institutions. If the statute is construed not to cover malpractice upon prisoners, the law will necessarily fail to encourage

physicians to work in prisons or jails. Nor is it likely that the legislature intended to deny protection to doctors because they had the poor judgment to obey the instructions of their lay superiors not to treat a prisoner because he was a brutal criminal, a Black Panther, or deserving of punishment.

Although the instant doctors are within the ambit of section 50-d, there still must be compliance with the Notice of Claim provisions. Section 50-d(2) provides in part:

> No action shall be maintained under this section against such municipality . . . unless a notice of claim shall have been made and served in compliance with section Fifty-e of this chapter.

We are concerned, now, not with the prisoners claim against the physician, but with the physician's claim against the City. The gravamen of the physician's claims would be that he has been held liable to the plaintiff, and wants the City to indemnify him. Unlike Mr. Berry's claim, the doctors' claims did not acrue on April 23, 1970—they have not accrued yet, and will not accrue until and unless the doctor or doctors are found liable.

This same question has arisen in the broader context of the responsibility of a city or county to indemnify a private joint tortfeasor, where the private tort was passive but the public tort active. In *Valstrey Service Corporation* v. *Board of Elections,* 161 N.Y.S. 2d 2 N.Y. 2d 413 (1957), Valstrey was sued by an individual who, while attempting to reach an election booth of the Board's, fell into a hole previously dug by Valestrey. Valestrey sought to join the Board of Elections, an agency of Nassau County, as a third party defendant. The Board objected on the ground that neither the individual plaintiff nor Valestrey had filed a notice of claim within 90 days of the accident. The Court of Appeals permitted the addition of the Board

and County. Referring to section 50-e, and a similar provision of County law, the Court held,

> [B]oth of these actions contemplate the filing of such a notice after the cause of action against the county shall have arisen. The brief for the county upon this appeal concedes that Valstrey's cause of action, if any, against the county does not accrue until Valstrey is case in judgment by a verdict in favor of the injured plaintiff. It is conceded that not until then could Valstrey's claim arise against the county.
>
> Whether such a claim would arise upon the entry or payment of a judgment against Valstrey, it is plain from the language of both section 52 of the County Law and of section 50-e of the General Municipal Law that no filing of claim by Valstrey against the county is required in order to maintain the third-party action.

161 N.Y.S. 2d at 54, 2 N.Y. 2d 415-416. That holding was applied only last year in *Zillman* v. *Meadowbrook Hospital Co., Inc.*, 342 N.Y.S. 2d 302, 305, 73 Misc. 2d 726 (1973). If indemnification can be sought by third party practice before the indemnitee's claim actually arises, *a fortiori* it can be sought thereafter provided the indemnitee files a timely Notice of Claim after judgment is entered against him.

This construction of the General Municipal Law manifestly furthers the purposes of section 50-d. The prophylactic effect of section 50-d would be considerably undermined if a doctor's right to indemnification could be lost merely because the aggrieved patient, over whom the doctor had no control, failed to file a Notice of Claim. Indeed, it would be particularly hard to persuade doctors to treat poor uneducated patients, not likely to know personally,

or through counsel, of the Notice of Claim requirements of Section 50-e. Moreover to deny a doctor indemnification because of a procedural error by a suing patient would undoubtedly violate the doctor's right to procedural due process of law guaranteed by the Fifth and Fourteenth Amendments. The more reasonable construction of sections 50-d and 50-e in a case such as this would be to permit a defendant doctor to obtain indemnification for any liability in a § 1983 action provided the doctor filed a timely Notice of Claim after the entry of judgment against him.

Conclusion

For the above reasons, plaintiffs maintain that the City of New York is subject to liability to indemnify Doctors Plew and Collins.

Plaintiffs further suggest, however, that this matter should not be adjudicated until the doctors obtain new counsel. These defendants are now represented by the Corporation Counsel, whose first loyalty is to New York City and who are subject to an inescapable conflict of interest. Had the doctors been represented by private counsel, they would long ago have joined the City as co-defendants; the Corporation Counsel, of course, has not done so. Now the doctors nominal attorneys are arguing that their clients must pay any judgment out of their own pockets, and should not be afforded indemnification by the City. That argument serves well the interests of New York City, but does not amount to representation of defendants Plew and Collins.

Respectfully submitted,

E. Schnapper
Jack Greenberg
Eric Schnapper
Counsel for Plaintiffs

Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

I.

JURISDICTION

The jurisdiction of this Court arises under the Constitution of the United States and in particular, under the Eighth and Fourteenth Amendments thereto, and under the laws of the United States, in particular, Title 28, United States Code, § 1343 and Title 42, United States Code, §§ 1981, et seq.

II.

PARTIES

A. *Plaintiffs*

1. Plaintiffs are all citizens of the United States.

2. Plaintiffs are, with but one exception,* members of the Black Panther Party for Self-Defense.

3. Plaintiffs are incarcerated at various detention centers of the City of New York pursuant to an indictment returned against them and eight others on April 2, 1969 by the Grand Jury of the County of New York. Said indictment, in twelve counts, charged plaintiffs with such crimes as conspiracy in the first degree, attempted murder, con-

* The exception is plaintiff Collier.

spiracy in the second degree, attempt to commit arson in the first degree, and arson in the first and second degree. The indictment is attached hereto as Exhibit A.

4. Plaintiffs have been incarcerated at the following institutions:

(A) Men's House of Detention in Manhattan, 125 White Street—plaintiffs Moore, Powell, Collier and Berry.

(B) Riker's Island—plaintiffs Josephs and McKiever.

(C) Women's House of Detention in Manhattan, 10 Greenwich Avenue—plaintiffs Misses Shakur and Bird.

(D) Bronx Men's House of Detention, 635 River Avenue—plaintiffs Shakur and Casson.

(E) Brooklyn Men's House of Detention, 275 Atlantic Avenue—plaintiff Johnson.

(F) Queens Men's House of Detention, 126-02 82nd Avenue, Kew Gardens, and 1 Court Square, Long Island City, New York—plaintiffs Tabor and Squires.

5. Plaintiffs are under the custody of defendant George F. McGrath, Commissioner of Corrections, New York City.

6. The pertinent background of each plaintiff is as follows:

(a) Afeni Shakur (Alice Williams, 22 years old), resides at 112 West 119th Street, New York, New York and has lived eight years in the City of New York. After completing the eleventh grade in high school, plaintiff continued her education at Roosevelt High School at night while working for the United States Post Office as one of

the first female mail carriers. She remained so employed for a period of one year. She was in the Manpower Training Program until August 1968. In September 1968 she was teaching a kindergarten class in P.S. 129 while the regularly assigned teachers were striking. After the school strike ended, she remained in the schools assisting a regular teacher in a third-grade class. Plaintiff has studied African culture and language at Yaronda Temple, on 119th Street and Seventh Avenue, New York, N.Y. During her youth, she received an award from the then Mayor, Robert Wagner, in a citywide journalism contest for her outstanding reasearch in a paper on juvenile delinquency. She is also a poet and has a poem printed in the "Anthology of High School Poetry". She has no prior record.

(b) Joan Bird (20 years old) resides with her parents at 3859 Eighth Avenue, New York, N.Y. She has lived with her parents in New York City all her life. At the time of her arrest, Miss Bird was a nursing student at Bronx Community College. Besides attending college, she was working as a teaching assistant at P.S. 175 aiding a regularly-assigned teacher with a kindergarten class. She is a graduate of Cathedral High School where she had an outstanding record for four years. Miss Bird was on $5,000 bail at the time of her arrest on substantially the same charges as alleged herein. (That indictment has been superseded by the present indictment). While on $5,000 bail she was available for any required court appearance and remained as a student at Bronx Community College as well as a teaching assistant, as aforesaid.

(c) Curtis Powell (33 years old) resides with his wife and two surviving children at 629 East 5th Street, New York, N.Y. At the time of his arrest he was employed as a research biochemist at Columbia Presbyterian Medical Center doing research in cancer. Dr. Powell holds a Ph.D

degree in Biochemistry. His salary, until it ceased because of his arrest, was $14,000 per year.

Dr. Powell's wife, Lena Powell, age 24, was six months pregnant at the time of his arrest. Since that time she has given birth to a son, two and one-half months prematurely, who died less than 24 hours after birth. Dr. Powell has been denied the right to speak to or visit with his wife in the hospital, despite her need for comfort and help. She is presently on welfare, having no other means of support while her husband is in jail.

Dr. Powell is a Korean War veteran, having received an honorable discharge from the United States Marine Corps with the rank of corporal. He has heretofore lived an exemplary life and has shown such stability and responsibility as to make him an ideal candidate for parole.

Dr. Powell's degree has been challenged at every hearing below by the prosecutor, although he has no evidence that Dr. Powell does not have a degree. Counsel presented the Supreme Court with two documents, both evidence of Dr. Powell's degree, one from his employer and one from a professor in Sweden where the degree was obtained.

(d) Robert Collier (32 years old) resides at 336 East 8th Street, New York, N.Y. Mr. Collier was employed as a staff director of the Tompkins Square Community Center, Inc., until funds were cut off on January 1, 1969. A respected leader of the lower East Side community, he was recommended by Hon. Percy E. Sutton to be on the Lower East Side Community Planning Board No. 3. At the time of his arrest, the Urban Coalition was in the process of refunding the aforesaid community center, with Mr. Collier as the director. Mr. Collier has lived in the City of New York for over one year. He is married and has one child. He has one prior arrest for which he was sen-

tenced to five years in prison. He was paroled after 21 months.

(e) Lee Berry (25 years old) is not mentioned in the indictment anywhere. It is neither alleged that he agreed with anyone to do anything nor that he committed any overt acts. He has been a resident of New York for approximately 15 years and has been living with his wife at 169 Jamaica Avenue, Brooklyn, N.Y. for the past six months. His wife gave birth to his first child on March 25, 1969. He has never been arrested or convicted of any crime. He entered the United States Army on July 20, 1964 and received an honorable discharge therefrom on April 20, 1966, after serving 7½ months in Vietnam. He is 70% permanently disabled, due to Service-connected epilepsy, and receives a veteran's disability pension of approximately $400 per month. He is unable to maintain a job because of his generally poor health and the frequency and severity of his epileptic attacks, as is stated in his Veterans Administration pension. Since his discharge from the Armed Service, he has done photographic work and, since the fall of 1968, has been an actor in the Oppressed People's Theatre of the Black Panther Party.

Mr. Berry suffered several severe epileptic seizures in the last weeks of March 1969 and was admitted to the Veterans Administration Hospital at 24th Street and First Avenue, New York, N.Y., while suffering from a seizure. He awoke the next morning covered with blood. He continued receiving intensive treatment and medication in the hospital, although he suffered more mild seizures thereafter.

On Saturday, April 5, 1969 his mother called him at the hospital and informed him that some policemen had been to her house and wished to ask him some questions about his brother. She informed him that the police were apparently unaware of his whereabouts, but left their telephone number for Mr. Berry to call if his mother located him.

Plaintiff Berry called the number and informed the policeman to whom he spoke that he did not know where his brother was but that if the police wished to speak to him, they were welcome to do so. He gave them the hospital address and the numbers of his floor and ward. Policemen arrived within an hour; immediately stated that he was under arrest; ordered him to get out of bed and get dressed; and thereupon placed him in handcuffs. The policemen told Mr. Berry's doctor to "discharge him because he is a murderer an arsonist and a Black Panther". Plaintiff Berry's plea that he was too ill to move—he had not even left the hospital to see his week-old son—was rejected.

Plaintiff Berry was arraigned that day without an opportunity to obtain counsel of his choice. He was thereafter placed in the Men's House of Detention at 125 White Street, New York, N.Y. On approximately April 6, 7 and 10, 1969, he suffered *grand* or *petit mal* epileptic seizures, losing consciousness each time. Because of his condition and his severe dietary problems, he had not retained anything in his stomach except water since Monday, April 7, 1969, having vomited all other food served him. He has received only part of the medication he had taken daily since 1966. He may die at any time if he swallows his tongue during a seizure, and the *grand mal* seizures he has suffered (where blood gushes from his mouth) make such a trage[illegible]an unfortunately real possibility.

(f) Richard Moore (24 years old) is a lifetime resident of New York City. He resides at 460 West 126th Street, New York, N.Y. He is a self-employed painter. He has helped to support his wife, whom he married two years ago, by working as a typesetter operator of photo lettering equipment. Although he has one prior conviction, he has never failed to appear for any of his prior court appearances.

Although the prosecutor claimed that Mr. Moore was not married in his affidavit below, counsel for plaintiff produced a valid marriage document, proving the prosecutor's statements to be unfounded and malicious.

(g) Alex McKiever (19 years old) resides at 40 West 135th Street, New York, N.Y. He is a student at Benjamin Franklin High School where he is president of the Afro-American History Club, and was due to be graduated this year. He has never been arrested before and has a perfect record to date. Mr. McKiever's parents are upstanding in the community and he and his family are members of the First Corinthian Baptist Church. His father is steadily employed by the New York City Transit Authority.

(h) Eddie Josephs (17 years old) resides at 960 East 223rd Street, Bronx, N.Y. He is a junior at Evander Childs High School where he maintains good grades. Mr. Josephs is also a member of the Minnisink Society, a religious order sponsored by the New York City Mission Society. Mr. Josephs has no prior arrests or convictions. Both his parents are deceased and his guardian is 75 years of age. This elderly woman exists on Social Security payments and receives some help from welfare.

(i) Lumumba Abdul Shakur (26 years old) resides at 112 West 119th Street, New York, N.Y. Mr. Shakur has lived in the City of New York for ten years. He is married and has three children. He has been employed by the Elsmere Tenants Council, 2040 Mapes Avenue, Bronx, N.Y., at subsistence wages. Although Mr. Shakur has prior convictions and three outstanding charges, he has never defaulted in court appearances.

After Mr. Shakur left the Elsmere Tenants Council for lack of funds, he became employed by the Harlem Community Housing Council at $95.00 per week until the time of his arrest. His wife and children have no one to rely

on at this time for support, due to the fact that Mr. Shakur is penniless.

(j) John J. Casson (Ali Bey Hassan, 31 years old) resides at 1259 Grant Avenue, Bronx, N.Y. He is married and has three children. He has lived in the community for over two years. He has never been arrested for or convicted of any crime. He is supported on subsistence wages by the Black Panther Party where he attempts to enlighten his community through education and organizing around community control issues.

(k) Walter Johnson (24 years old) resides at 2016 Seventh Avenue, New York, N.Y., and has lived in New York for five years. Mr. Johnson has been employed in various jobs, such as a laborer and a grocery clerk, in which capacity he has helped support his mother. He has never been arrested for or convicted of any crime.

(l) Michael Tabor (22 years old) resides at 459 East 163rd Street, Bronx, N.Y., and has lived in the same community for his entire life. His parents also have lived in the same area for most of their lives. He is employed as an artist for the Black Panther Party and is married. His wife, who is pregnant and who is presently being detained at the Women's House of Detention, was picked up at the same time as her husband, although she is not named in the indictment. Mr. Tabor, who was on probation at the time of his arrest, has no appearance defaults.

(m) Clark Squires (32 years old) resides at 668 Riverside Drive, New York, N.Y., and has lived in the City of New York for the past six years. He is employed as a computer operator for Data Processing International. He has one conviction and his probation officer in Queens states that he has had an excellent record for the past two years.

B. *Defendant*

1. Defendant George F. McGrath is a citizen of the United States.

2. Defendant McGrath is Commissioner of Correction of the City of New York. He is sued individually and in his official capacity. He has official custody of plaintiffs in the institutions in which they are incarcerated.

III.

Cause of Action

Defendant McGrath, acting under color of State law, has directed or permitted and is directing or permitting his agents and employees to deprive plaintiffs of rights afforded to them by statute and regulation and by the Constitution of the United States. Such action by defendant McGrath has no justification or excuse in law and is instead gratuitous, illegal, improper, and unrelated to any ends which defendant McGrath may legitimately pursue. Thus, defendant McGrath is responsible for the violation of the plaintiffs' rights to be free from cruel and unusual punishment, to due process of law, and to equal protection of the law under the Eighth and Fourteenth Amendments to the Constitution of the United States.

Upon information and belief, the behavior of defendant McGrath and his agents must be seen in the context of a widespread and malicious program of prosecutions and acts of harassment being undertaken by police and prison officials throughout the country against the leadership and members of the Black Panther Party. Acting with unusual expediency and upon minimal evidence, police have subjected innocent black citizens to unfounded arrests and unwarranted searches and seizures, as in Sacramento, Cali-

fornia; Newark, New Jersey; Denver, Colorado; Chicago, Illinois; and Salt Lake City, Utah; and New Haven, Connecticut. They have provoked violent confrontations, as in Oakland, Chicago and Newark, for the purpose of eliminating Blank Panther leaders through arrests or death. See generally "Panther Leadership Hit by Sweeping FBI Raids", *Washington Post*, June 25, 1969 (Exhibit B). Once arrested, as in this very case, Black Panther prisoners have, upon information and belief, suffered beatings for the purpose of extorting confessions; have had unreasonable, unattainable bails set; and, during pre-trial detention, have suffered physical abuse, deliberate maltreatment and countless indignities, largely at the direction of prison authorities. While there have been convictions, they have not always been supported by the evidence, as in the Oakland trial of Huey P. Newton, and have resulted in harsh sentences and unequal standards for probation.

Upon information and belief, this program of persecution results from the open hostility of local police forces, the Federal Bureau of Investigation, and local and federal public officials to the Black Panther Party and its political stance. The Black Panther Party, however, has been singled out for widespread and very possibly concerted police harassment, partly because of its unique determination and success in organizing victimized black ghetto dwellers to demand their due; and partly because of the well-known racist reaction of many Americans to any display of dignity on the part of black men and women. See, generally, *Report of the National Advisory Commission on Civil Disorders*, 1968. Feeling personally threatened by black people's attempts to extract just treatment from this nation's institutions and a just portion of their wealth, the forces of reaction are attempting to direct the facilities of law enforcement agencies, especially against the vanguard of the black movement. Thus, harassment in prison is but

one, not unexpected, manifestation of political repression through supposedly impartial law enforcement institutions.

Plaintiffs, virtually from the moment of their arrests, have been kept separate from each other, in that they have been incarcerated in the different detention centers as set out above. In addition, those plaintiffs who are incarcerated in the same institution have been kept separate and apart from each other at all times, except when allowed to see counsel. Such separation has been, upon information and belief, the result of official orders by defendant McGrath and his agents and employees, such as Department of Correction Deputy Commissioner Frederick C. Rieber, and Director of Operations Anthony Principe, on the grounds that plaintiffs are extremely dangerous. (See letter of Frederick C. Rieber, Deputy Commissioner of the Department of Correction, dated May 12, 1969, attached hereto as Exhibit C).

The separation of plaintiffs and the conditions under which they are in custody are based upon an arbitrary and unreasonable judgment made by defendant McGrath. In a directive written April 3, 1969, Department of Correction Director of Operations Anthony Principe, concerning the plaintiffs, stated:

> "The inmates listed herein are charged with conspiracy as a result of an attempt to 'blow up' various institutions of the city. There is reason to believe that they are extremely dangerous . . ."
>
> "Therefore, these inmates shall be treated as close custody cases at all times while in the respective institutions. When transferred to and from court or other outside agencies as may be required they shall be handled as special transfers and extra precautions shall be taken. THEY SHALL BE KEPT SEPERATE [SIC] AND APART FROM EACH OTHER AT ALL TIMES." (Emphasis in original). (See Exhibit B, pp. 2-3).

Thus, without a hearing of any kind, and obviously based upon a conclusion that plaintiffs are guilty as charged, defendant McGrath and his agents have acted in such a manner as to deny due process of law and equal protection of the law to plaintiffs.

The treatment of plaintiffs pursuant to this arbitrary decision also violates plaintiff's right to be free from cruel and unusual punishment, as guaranteed by the Eighth Amendment. Since plaintiffs have not been charged with infraction of any detention center rules or regulations, and since there has been no explicit or implicit reason given for their treatment, such treatment, as detailed below, constitutes cruel and unusual punishment, for, where there has been no crime, *any* form of punishment must be looked upon as being cruel and unusual.

Plaintiffs were initially—and for the most part still are—subjected to the most onerous and inhuman of jail conditions, the objective of which was their psychological and physical destruction during their pre-trial detention. These conditions, to which no other prisoners are subjected without having first committed a serious infraction of prison rules *after* entering prison, were as follows:

Plaintiffs Powell, Berry, Collier and Moore, at the Men's House of Detention in Manhattan, have been kept on 24-hour lock-up. They are allowed no library facilities, no television and no recreation, as are allowed all other prisoners, including those charged with actual murder. Plaintiff Curtis Powell is allowed to see his wife only 15 minutes at a visit, instead of the 30 minutes provided by regulation. Plaintiff Lee Berry, an epileptic, has had eight seizures between April 3 and June 11, 1969. Following some of these seizures (which occurred during the night) he would wake to find the floor covered with blood. Plaintiff Berry has been verbally abused by a doctor for complaining because of the lack of medical attention. Plaintiff Berry does not have a mattress in his cell.

Plaintiff Berry, who was arrested in a Veterans Administration hospital, where, as an honorably discharged veteran he was receiving treatment as an epileptic subject to *grand mal* seizures, must, in order to prevent such convulsions (which can be fatal), take certain drugs such as phenobarbital and dilantin, both of which have a certain depressant effect on the user.*

At approximately 3:00 p.m., on July 23, 1969, while Berry, who was under the influence of the above-mentioned medication, was lying on his bunk in Cell No. Lower F-2, Tenth Floor, Manhattan Men's House of Detention, an institution wholly under the direction and control of defendant, the Commissioner of Correction of the City of New York, a white Correction Officer, apparently wearing Shield No. 488, by the name of "John" Dieselhurst (phonetic spelling) entered said cell and ordered plaintiff Berry to "Get the fuck up!" When said plaintiff, who had been dozing, stuggled to rise to his feet, said Dieselhurst drew out his blackjack and viciously struck plaintiff on his left temple, knocking him to the floor of said cell and causing him to bleed profusely.

Plaintiff Berry, who was in a stunned and dazed condition, was then taken to the first floor of said Men's House of Detention where the blood which now covered his head, face and shoulders were washed away. After being examined by a prison physician whose name plaintiff believes to be Dr. Spongood, plaintiff was accused of having threatened said Correction Officer Dieselhurst and punished therefor by having his visiting privileges cancelled for five days and being given five days solitary confinement "in the hole".

---

* When Berry was first incarcerated, he was denied the proper medication for his condition. It took an order of this Court to ensure that his medical needs would be met.

On July 24, 1969, plaintiff Berry's wife spent the entire day waiting in the outer room at said Men's House of Detention for an opportunity to see her husband, after she had learned of his having been beaten. She obtained just one brief glimpse of him when he was leaving the counsel room on the first floor thereof, after a consultation with two of his attorneys.

The aforesaid attorneys, William M. Kunstler and Gerald B. Lefcourt, observed a marked abrasion on plaintiff Berry's left temple and the fact that he was in an obviously dazed and confused condition. However, he was able to relate to them the facts set forth above as to the assault upon him.

Upon information and belief, plaintiff Berry was brutally beaten, as aforesaid, because he is a member of the Black Panther Party, said beating being a continuation of the brutal and inhuman treatment afforded to him and his co-plaintiffs by defendant McGrath at the direction and/or urging of the District Attorney of New York County, in the latter's attempt to break the morale and spirit of said plaintiffs in order to obtain convictions thereof.

Plaintiff Curtis Powell is at times without sheets, pillowcases, soap or toilet tissue. He is allowed mail only from his immediate family. He has been denied access to legal papers pertaining to his case. He is subjected to additional harassment by being stripped naked and thoroughly searched after each court appearance or visit by counsel, and before and after visits to the commissary or answering sick call.

Plaintiff Powell's wife, beginning approximately August 1, 1969, has been subjected to unnecessary and humiliating physical searches of her person.

Legal papers which have been sent to plaintiff Richard Moore have been confiscated and denied him; mail from his attorneys has been held up for as long as two weeks.

From the date of his incarceration until the middle of June, 1969, approximately two and one half months, he had no mattress in his cell, was allowed to shower only once a week, and received no mail.

Vital legal papers which were sent by his counsel have never reached plaintiff Robert Collier. He is kept apart from other prisoners at all times and is escorted to the commissary and to a special visiting booth by a guard. His wife, when visiting him, has been subjected to searches of her person, although this treatment is not given other prisoners' visitors.

Plaintiff Lumumba Shakur, after his arrest, was transferred from the Manhattan Men's House of Detention to the Bronx Men's House of Detention, where he was immediately placed in solitary confinement on the grounds that he was a "security risk". He was not released from that confinement until June 6, 1969.

On July 2, 1969, after a meeting with his counsel, plaintiff Shakur was returning to his cell carrying a copy of *The Black Panther*, Black Community News Service, published weekly by the Black Panther Party. A guard took the paper from him, claiming that it was contraband. On July 8, 1969, six days after the incident, plaintiff Shakur was taken by a white Deputy Warden and a white officer to the "bing", a disciplinary cell, for possession of the above-named paper. He was held in this cell for ten days; the punishment included 24-hour lock-up, no showers, no mail, no visits, and no commissary privileges.

Plaintiff Shakur's mail is regularly held up for more than two weeks. Mail which he has sent to relatives and the Black Panter Party has never reached its destination.

At the Bronx Men's House of Detention, plaintiff John Casson is not permitted to see his wife. Plaintiff Lumumba Shakur's wife has been constantly harassed. Both are on 24-hour lock-up with lights on in their cells 24 hours a day.

They are allowed no recreational facilities nor do they have any reading material, as allowed to all other inmates.

Plaintiffs Michael Tabor and Clark Squires are kept in two separate institutions in Queens on 24-hour lock-up with lights on 24 hours a day. They have no access to books, television or recreational facilities. They are not permitted to talk to other prisoners. Plaintiff Squires is not allowed to go to the commissary. He is not allowed to keep the legal papers sent to him by his attorney, but can only see them at the infrequent periods of roof recreation, which amounts to sitting or walking in a confined space for a short period of time.

In the Men's House of Detention in Brooklyn, plaintiff Walter Johnson, though he has committed no infraction of the rules, is kept in that part of the prison reserved for "troublemakers." The lights burn in his cell 24 hours a day. He is not allowed access to radio, television or recreational facilities. He has nothing to sit on except the floor and has no drinking vessel.

None of the plaintiffs has been allowed any contact with each other.

Thus, plaintiffs have been subjected to harsh and inhuman treatment which is usually reserved only for inmates who have broken rules or regulations. Such treatment is a denial of due process of law and equal protection of law, in that it amounts to cruel and unusual punishment.

In addition to the acts alleged above, it should be noted that the program of persecution has otherwise been carried out by police and attorneys for the State and by the press. On April 5, 1969 the *New York Post*, New York City's only evening newspaper,* alleged that District Attorney Hogan's office was presently "investigating the possibility that . . . money stolen from the Neighborhood

* With the largest evening circulation in the United States.

Youth Corps" was used to support the conspiracy alleged in the instant indictment. On page 2, column 1, in a by-lined story, the link between the Black Panther "plot" and the alleged theft turned out to be the flimsy fact that one of the indicted Panthers gave an address in the same building as a young lady who was "questioned in connection with the theft of Youth Corps funds." This story, published under the headline "Seek Panther link to stolen Youth Funds", was based on "sources close to the investigation", obviously members of the District Attorney's office. In addition to exciting public hatred and contempt against plaintiffs and the Black Panther Party in general, this story indicates the readiness of the District Attorney to publicly and privately associate Black Panthers with criminal activity, however minimal the basis.

Harassment by police and the press even took the form of unevidenced assertions of conduct suggesting treasonous activity. On April 4, 1969, "high police sources" leaked to the press alleged information that the Black Panther Party, mentioned throughout the indictment, was financially supported by officials of the Government of Cuba. *The Daily News*, in a banner front-page headline ("Cops Say Cuba Aids Panthers"), and a page 3 headline ("Cops: Cuba Helps Panthers to Prowl") and accompanying story stated:

> "From police who infiltrated the outfit, foiling the alleged plot only a day before its scheduled execution, and from others close to the three-year investigation, these reports about the Panthers came to light. Members strictly follow the hard line Mao philosophy, using the so-called red book of the Chinese Communist boss as their text. At meetings they are regularly tested on their knowledge of Mao's thoughts. . . ."

Since there has been no offer of proof in this case of the allegations contained in the above story, it is evident that the sole purpose of this leak was to further harass the

plaintiffs by using official instrumentalities of law enforcement.

The atmosphere of public alarm that now exists is largely the result of caluculated action by the District Attorney's office and the police. On April 2, 1969, at about 11:00 a.m., District Attorney Frank S. Hogan, in a rare television appearance, released to the press charges and supposed information on the alleged crimes and defendants, calculated to terrorize and influence the public and the judiciary so as to deny any possibility of a fair and impartial trial, as well as to justify to prison officials any mistreatment they might impose under a facade of prison security. Similarly directed were allegations made, and represented to the public as proven truths, pertaining to the threatened bombing of places of public congregation, attempts to murder, and other illegal acts having a callous disregard for public safety.

Moreover, on April 11, 1969, at a bail reduction hearing before Mr. Justice Charles Marks of the Supreme Court, in Part 41 thereof, the Assistant District Attorney, in an obvious attempt to further terrorize the Court, produced a pipe which he called a "bomb". He then went on to say that it was "exactly like the pipe-bomb used in the Chicago department stores last week." The clear implication of the Assistant District Attorney's remarks was to link these plaintiffs to the Chicago incident (and to imply that the bombing was planned and executed by Black Panthers), even though it has since been learned that a white ex-Marine has admitted his culpability in connection with the Chicago occurrence. (*Cf. New York Times,* April 15, 1969, p. 1, col. 1).

It is clear that the state courts of New York have created a record which has been influenced by the atmosphere of fear and contempt noted above. On several occasions, rulings supported arbitrary denials and obstructions by

police guards of plaintiffs' right to consult with their counsel. Other rulings, particularly those imposing and failing to relieve extraordinary bail amounts, have lent credibility to the alleged wickedness and dangerousness of the plaintiffs on the basis of the crimes with which they have been *charged,* although it is fundamental that plaintiffs are "innocent" of such state of mind until after a lawful adjudication of guilt.

Thus, the state courts have repeatedly revealed their own surrender to blatant appeals to fear, while, intentionally or not, corroborating those prejudicial cries with the harshness of their rulings.

It is hardly surprising, then, that defendant McGrath and his employees have reacted to police, prosecutorial and judicial actions. As has been noted, *supra,* the conditions to which plaintiff have been subjected flow from a design to harass and punish, not merely to detain to assure presence at trial. Officials and employees of the Department of Correction are assuring the punishment of plaintiffs for their political beliefs, irrespective of whether any or all of them will be determined guiltless. It is difficult to imagine a more undemocratic vestige of totalitarian practices, or a procedure more calculated to intimidate and crush a political movement.

IV

Relief Requested

Wherefore, plaintiffs pray for the following relief:

(a) That a preliminary and permanent injunction issue:

(i) ordering defendant McGrath and his agents:

(A) to release plaintiffs Powell, Berry, Collier, Moore, Casson, Shakur, Tabor and squires from 24-hour lock-up;

(B) to permit said plaintiffs their normal rights to access to library facilities, television and recreation;

(C) to permit plaintiff Powell the exercise of his full marital rights to be visited by his wife for a full half hour;

(D) to transfer plaintiff Berry to a hospital for treatment of his epileptic condition;

(E) to permit plaintiff Casson his right to visit with his wife;

(F) to turn off the lights in the cells in which plaintiffs Casson, Shakur, Tabor, Squires and Johnson are incarcerated during the night-time hours; and

(G) to cease and desist from visiting any punishment on all plaintiffs herein prior to trial.

(b) That damages be awarded to plaintiffs in the sum of $100,000 each, with the exception of plaintiff Lee Berry, where actual and punitive damages are demanded in the amount of $500,000 for grossly abusive physical and psychological treatment inflicted upon all plaintiffs while incarcerated, in violation of their rights to be free from cruel and unusual punishment and to do process of the law and equal protection of the law, which rights have been secured to plaintiffs by the Eighth and Fourteenth Amendments to the United States Constitution

(c) for such other and further relief as this Court deems just and proper.

GERALD B. LEFCOURT
FREDERICK H. COHN
WILLIAM E. CRAIN
WILLIAM M. KUNSTLER
ARTHUR TURCO
SANFORD M. KATZ
Attorneys for Plaintiffs

Amended Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLAINTIFFS

1. Plaintiffs are all citizens of the United States. They are, with but one exception,* members of the Black Panther Party for Self-Defense, a political party formed to struggle for full freedom for all black citizens. Plaintiffs are incarcerated at various detention centers of the City of New York pursuant to an indictment returned against them and eighth others on April 2, 1969 by the Grand Jury of the County of New York. Said indictment, in twelve counts, charged plaintiffs with such crimes as conspiracy in the first degree, attempted murder, conspiracy in the second degree, attempt to commit arson in the first degree, and arson in the first and second degree. The indictment is attached hereto as Exhibit A.

2. Plaintiffs have been segreated and incarcerated at the following institutions:

a) Men's House of Detention in Manhattan, 125 White Street—plaintiffs Moore, Powell, Collier and Berry.

b) Riker's Island—plaintiffs Josephs and McKiever.

c) Women's Mouse of Detention in Manhattan, 10 Greenwhich Avenue—plaintiffs Misses Shakur and Bird.

d) Bronx Men's House of Detention, 635 River Avenue—plaintiffs Shakur and Casson.

---

* The exception is Robert Collier.

e) Brooklyn Men's House of Detention, 275 Atlantic Avenue—plaintiff Johnson.

f) Queens Men's House of Detention, 126-02 82nd Avenue, Kew Gardens and 1 Court Square, Long Island City, New York—plaintiffs Tabor and Squires.

3. Plaintiffs are under the custody of defendant George F. McGrath, Commissioner of Correction, New York City.

DEFENDANTS

4. Defendant George F. McGrath is a citizen of the United States. Defendant McGrath is Commissioner of Correction of the City of New York. He has official custody of plaintiffs in the institutions in which they are incarcerated. As Commissioner of Correction he has a sworn duty under the Constitution to protect all of the plaintiffs' constitutional and statutory rights while they are incarcerated in these institutions. He is sued individually and in his official capacity.

5. Defendant Frank S. Hogan is a citizen of the United States. Defendant Hogan is District Attorney for the County of New York. As District Attorney, he has a sworn duty under the Constitution to protect all of the plaintiffs' constitutional and statutory rights while they are being prosecuted subject to an indictment bearing his signature. He is sued individually and in his official capacity.

JURISDICTION

6. The jurisdiction of this court arises under the Constitution of the United States and, in particular, under the Eighth and Fourteenth Amendments thereto, and under the

laws of the United States, in particular, Title 28, United States Code, § 1343 and Title 42, United States Code, §§ 1981, et seq.

7. The amount in controversy, exclusive of interests and costs, exceeds $10,000.

CAUSE OF ACTION

8. Defendants, each individually and acting in concert, under color of State law, have directed or permitted and are directing or permitting their agents and employees to deprive plaintiffs of their rights as citizens afforded them by statute, regulation, and by the Constitution of the United States. Defendants are responsible for the violation of the plaintiffs' rights to be free from the infliction of cruel and inhuman punishment, to due process of law, and to equal protection of the law under the Eighth and Fourteenth Amendments of the Constitution of the United States, as well as their correlative statutory rights, given by Title 28, United States Code, § 1343 and Title 42, United States Code, §§ 1981 et seq. Such actions by defendants have no justification or excuse in law and are instead gratuitous, illegal, improper and unrelated to any ends which defendants may legitimately pursue.

9. On information and belief, defendant Hogan has gone to great lengths to characterize through propaganda the plaintiffs as "extremely dangerous," and capable of the most heinous crimes based upon his own interpretation of the serious nature of the charges against the plaintiffs to the end that defendant McGrath, acting in concert with defendant Hogan, justifies the deprivation of constitutionally and statutorily vested rights of the plaintiffs on the basis of the Hogan characterization. Both defendants are part of a program of persecution of the Black Panther Party

which has been carried out by police and attorneys for the State and by the press, purposefully designed to break the strength and will of the Black Panther Party hierarchy.

10. As a part of the plan, on April 5, 1969, the *New York Post,* New York City's only evening newspaper,* alleged that District Attorney Hogan's office was presently "investigating the possibility that . . . money stolen from the Neighborhood Youth Corps" was used to support the conspiracy alleged in the instant indictment. On page 2, column 1, in a bylined story, the link between the Black Panther "plot" and the alleged theft turned out to be the flimsy fact that one of the indicted Panthers gave an address in the same building as a young lady who was "questioned in connection with the theft of Youth Corps funds." This story, published under the headline "Seek Panther Link to Stolen Youth Funds," was based on "sources close to the investigation," obviously members of the District Attorney's office. In addition to exciting public hatred and contempt against plaintiffs and the Black Panther Party in general, this story indicates the desire of the District Attorney to publicly and privately associate Black Panthers with criminal activity, however minimal the basis.

11. On April 4, 1969, "high police sources" leaked to the press alleged information that the Black Panther Party, mentioned throughout the indictment, was financially supported by officials of the Government of Cuba. *The Daily News,* in a banner front-page headline, "Cops Say Cuba Aids Panthers" and a page 3 headline, "Cops: Cuba Helps Panthers to Prowl" and accompanying story, stated:

---

* With the largest evening circulation in the United States.

> From police who infiltrated the outfit, foiling the alleged plot only a day before its scheduled execution, and from others close to the three-year investigation, these reports about the Panthers came to light. Members strictly follow the hard line Mao philosophy, using the so-called red book of the Chinese Communist boss as their text. At meetings they are regularly tested on their knowledge of Mao's thoughts. . . .

Since there has been no offer of proof in this case of the allegations contained in the above story, it is evident that the sole purpose of this leak was to further harass the plaintiffs, and to influence the Commissioner of Correction, as well as the public at large, to accept the position that plaintiffs were "extremely dangerous, capable of the most heinous crimes," and therefore must be treated differently from others in violation of their constitutional rights.

12. On information and belief, the atmosphere of public alarm that now exists is largely the result of calculated action by the District Attorney's office and the police under his control. On April 2, 1969, at about 11:00 a.m., District Attorney Frank S. Hogan, in a rare television appearance, released to the press charges and supposed information on the alleged crimes and defendants, calculated to terrorize and influence the public and the judiciary so as to deny any possibility of a fair and impartial trial, as well as to justify to prison officials any mistreatment they might impose under a facade of prison security. Similarly directed were allegations made, and represented to the public as proven truths, pertaining to the threatened bombing of places of public congregation, attempts to murder, and other illegal acts having a callous disregard for public safety.

13. On April 11, 1969, at a bail reduction hearing before Mr. Justice Charles Marks of the Supreme Court, in Part 41 thereof, the Assistant District Attorney, an agent of defendant Hogan, in an obvious attempt to further the Court and the general public, produced a pipe which he called a "bomb". He then went on to say that it was "exactly like the pipe-bomb used in the Chicago department stores last week." The clear implication of the Assistant District Attorney's remarks was to link these plaintiffs to the Chicago incident (and to imply that the bombing was planned and executed by Black Panthers), even though it has since been learned that a white ex-Marine has admitted his culpability in connection with the Chicago occurrence. (Cf. *New York Times*, April 15, 1969, p. 1, col. 1).

14. On information and belief, because of the effectiveness of defendant Hogan's campaign to arouse public ire against plaintiffs by means of publicly disseminated, unfounded allegations and innuendo, defendant McGrath, acting in concert with defendant Hogan, justifies having kept plaintiffs separate from each other, virtually from the moment of their arrest, "predicated on the serious nature of the charges . . ." Plaintiffs have been incarcerated at different detention centers as set out above. In addition, those plaintiffs who are incarcerated in the same institution have been segregated not only from each other at all times except when allowed to see counsel, but also from other inmates as well. Such segregation has been, upon information and belief, the result of official orders by defendant McGrath and his agents and employees, such as Department of Correction Deputy Commissioner Frederick C. Rieber and Director of Operations Anthony Principe, on the grounds that plaintiffs are extremely dangerous. As a result of this segregation, plaintiffs are denied services

normally available to other inmates, even those *convicted* of crimes as opposed to those *held in lieu of bail.* (See letter of Frederick C. Rieber, Deputy Commissioner of the Department of Correction, dated May 12, 1969, attached to the original complaint as Exhibit C).

15. On information and belief, the separation of plaintiffs and the conditions under which they are in custody are based upon an arbitrary and unreasonable judgment made by defendant McGrath. In a directive concerning the plaintiffs, written April 3, 1969, Department of Correction Director of Operations Anthony Principe stated:

> The inmates listed herein are charged with conspiracy as a result of an attempt to "blow up" various institutions of the city. There is reason to believe that they are extremely dangerous. . . .
>
> Therefore, these inmates shall be treated as close custody cases at all times while in the respective institutions. When transferred to and from court or other outside agencies as may be required they shall be handled as special transfers and extra precautions shall be taken. THEY SHALL BE KEPT SEPERATE [sic] AND APART FROM EACH OTHER AT ALL TIMES.
>
> (Emphasis in original.) (See Exhibit B, Original Complaint, pp. 2-3).

Thus, without a hearing of any kind, and obviously based upon a conclusion that plaintiffs are guilty as charged, defendant McGrath and his agents have acted in such a manner as to deny due process of law and equal protection of the law to plaintiffs.

16. The treatment of plaintiffs pursuant to this arbitrary decision also violates plaintiffs' right to be free from cruel and unusual punishment, as guaranteed by the Eighth

Amendment. Since plaintiffs have not been charged with infractions of any detention center rules or regulations, and since there has been no explicit or implicit reason given for their treatment, such treatment, as detailed below, constitutes cruel and unusual punishment, for, where there has been no crime, *any* form of punishment must be looked upon as being cruel and unusual.

17. Plaintiffs were initially—and for the most part still are—subjected to the most onerous and inhuman of jail conditions, the objective of which was their psychological and physical destruction during their pre-trial detention. These conditions, to which no other prisoners are subjected without having first committed a serious infraction of prison rules *after* entering prison, were as follows:

a) Plaintiffs Powell, Berry, Collier and Moore, at the Men's House of Detention in Manhattan, have been kept on 24-hour lock-up. They are allowed no library facilities, no television and no recreation, as are allowed all other prisoners, including those charged with actual murder. Plaintiff Curtis Powell is allowed to see his wife only fifteen minutes at a visit, instead of the thirty minutes provided by regulation. Plaintiff Lee Berry, an epileptic, has had eight seizures between April 3 and June 11, 1969. From June 11, 1969 until the present, he has had approximately eight additional seizures. Following some of said seizures (which occurred during the night), plaintiff Berry would awake to find the floor covered with blood. He has also been verbally abused by a doctor for complaining about the lack of medical attention. He was furthermore deprived of a mattress in his cell.

b) Plaintiff Berry, who was arrested in a Veterans Administration hospital where, as an honorably discharged veteran he was receiving treatment as an epileptic subject

to *grand mal* seizures, must, in order to prevent such convulsions (which can be fatal), take certain drugs such as phenobarbital and dilantin, both of which have a certain depressant effect on the user.*

---

* When Berry was first incarcerated, he was denied the proper medication for his condition. It took an order of this Court to ensure that his medical needs would be met.

c) At approximately 3:00 p.m., on July 23, 1969, while Berry, who was under the influence of the above-mentioned medication, was lying on his bunk in Cell No. Lower F-2, Tenth Floor, Manhattan Men's House of Detention, an institution wholly under the direction and control of defendant, the Commissioner of Correction of the City of New York, a white Correction Officer, apparently wearing Shield No. 488, by the name of "John" Dieselhurst (phonetic spelling), entered said cell and ordered plaintiff Berry to "Get the fuck up!" When said plaintiff, who had been dozing, struggled to rise to his feet, said Dieselhurst drew out his blackjack and viciously struck plaintiff on his left temple, knocking him to the floor of said cell and causing him to bleed profusely.

d) Plaintiff Berry, who was in a stunned and dazed condition, was then taken to the first floor of said Men's House of Detention where the blood, which now covered his head, face and shoulders, was washed away. After being examined by a prison physician whose name plaintiff believes to be Dr. Spongood, plaintiff was accused of having threatened said Correction Officer Dieselhurst and punished therefor by having his visiting privileges cancelled for five days and being given five days solitary confinement "in the hole."

e) On July 24, 1969, plaintiff Berry's wife spent the entire day waiting in the outer room at said Men's House

of Detention for an opportunity to see her husband, after she had learned of his having been beaten. She obtained just one brief glimpse of him when he was leaving the counsel room on the first floor thereof, after a consultation with two of his attorneys.

f) The aforesaid attorneys, William M. Kunstler and Gerald B. Lefcourt, observed a marked abrasion on plaintiff Berry's left temple and the fact that he was in an obviously dazed and confused condition. However, he was able to relate to them the facts set forth above as to the assault upon him.

g) Upon information and belief, plaintiff Berry was brutally beaten, as aforesaid, because he is a member of the Black Panther Party, said beating being a continuation of the brutal and inhuman treatment afforded to him and his co-plaintiffs by defendant McGrath at the direction and/or urging of the District Attorney of New York County, in the latter's attempt to break the morale and spirit of said plaintiffs in order to obtain convictions thereof.

h) Plaintiff Berry sought habeas corpus relief in July 1969, seeking an order transferring him to the Bellevue Medical Center prison ward. After a long series of applications, affidavits, court appearances and medical examinations, plaintiff Berry was finally tansferred to Bellevue for treatment on November 21, 1969.

i) Plaintiff Curtis Powell is at times without sheets, pillowcases, soap or toilet tissue. He is allowed mail only from his immediate family. He has been denied access to legal papers pertaining to his case. He is subjected to additional harassment by being stripped naked and thoroughly searched after each court appearance or visit by counsel, and before and after visits to the commissary or answering sick call.

j) Plaintiff Powell's wife, beginning approximately August 1, 1969, has been subjected to unnecessary and humiliating physical searches of her person. Such searches have the effect of intimidating not only Plaintiff Powell's wife from coming to visit him, but also all other members of his family who would elect to do so but for the fact they fear similar unwarranted treatment. As a result, plaintiff Powell is being deprived of his visitation rights.

k) Legal papers which have been sent to plaintiff Richard Moore have been confiscated and denied him, mail from his attorneys have been held up for as long as two weeks. From the date of his incarceration until the middle of June, 1969, approximately two and one half months, he had no mattress in his cell, was allowed to shower only once a week, and received no mail.

l) Vital legal papers which were sent by his counsel have never reached plaintiff Robert Collier. He is kept apart from other prisoners at all times and is escorted to the commissary and to a special visiting booth by a guard. His wife when visiting him has been subjected to searches of her person, although this treatment is not given other prisoners' visitors. As outlined above, the result of this treatment towards his wife is to deprive plaintiff Collier of his visitation rights.

m) Plaintiff Lumumba Shakur, after his arrest was transferred from the Manhattan Men's House of Detention to the Bronx Men's House of Detention, where he was immediately placed in solitary confinement on the grounds that he was a "security risk". He was not released from that confinement until June 6, 1969.

n) On July 2, 1969, after a meeting with his counsel, plaintiff Shakur was returning to his cell carrying a copy of *The Black Panther,* Black Community News Ser-

vice, published weekly by the Black Panther Party. A guard took the paper from him, claiming that it was contraband. On July 8, 1969, six days after the incident, plaintiff Shakur was taken by a white Deputy Warden and a white officer to the "bing," a disciplinary cell, for possession of the above-named paper. He was held in this cell for ten days; the punishment included 24-hour lock-up, no showers, no mail, no visits, and no commissary privileges.

o) Plaintiff Shakur's mail is regularly held up for more than two weeks. Mail which he has sent to relatives and the Black Panther Party has never reached its destination.

p) At the Bronx Men's House of Detention, plaintiff John Casson is not permitted to see his wife. Plaintiff Lumumba Shakur's wife has been constantly harassed. Both plaintiff Shakur and Casson are on 24-hour lock-up with lights on in their cells 24 hours a day. They are allowed no recreational facilities nor do they have any reading material, as allowed to all other inmates.

q) Plaintiffs Michael Tabor and Clark Squires are kept in two separate institutions in Queens on 24-hour lock-up with lights on 24 hours a day. They have no access to books, television or recreational facilities. They are not permitted to talk to other prisoners. Plaintiff Squires is not allowed to go to the commissary. He is not allowed to keep the legal papers sent to him by his attorney, but can only see them at the infrequent periods of roof recreation, which amounts to sitting or walking in a confined space for a short period of time.

r) In the Men's House of Detention in Brooklyn, plaintiff Walter Johnson, although he has committed no infraction of the rules, is kept in that part of the prison reserved for "troublemakers". The lights burn in his cell 24 hours a day. He is not allowed access to radio, television or

recreational facilities. He has nothing to sit on except the floor and has no drinking vessel.

s) None of the plaintiffs has been allowed any contact with each other.

18. Thus, plaintiffs have been subjected to harsh and inhuman treatment which is usually reserved only for inmates who have broken rules or regulations. Such treatment is a denial of due process of law and equal protection of law, resulting in the infliction of cruel and inhuman punishment upon plaintiffs.

19. On information and belief, defendant McGrath has surrendered to the blatant appeals to fear made public by defendant Hogan, while intentionally corroborating these prejudicial cries with the harshness of their treatment of plaintiffs while being incarcerated in lieu of bail. Defendant McGrath and his employees have reacted not only to the plaintive cries of defendant Hogan, but also to the effect of his efforts on others: namely, the police and judicial actions of setting unattainable bail to ensure incarceration. As noted, *supra,* the conditions to which plaintiffs have been subjected flow from a design on the part of defendants Hogan and McGrath to harass and punish the hierarchy of the Black Panther Party, not merely to detain plaintiffs to assure presence at trial.

Relief Requested

Wherefore, plaintiffs pray that the court grant the following relief:

A. That a preliminary and permanent injunction issue ordering McGrath and his agents:

(1) to release plaintiffs Powell, Collier, Moore, Casson, Shakur, Tabor and Squires from 24-hour lock-up;

(2) to permit said plaintiffs their normal rights to access to library facilities, television and recreation;

(3) to permit plaintiff Powell the exercise of his full marital rights to be visited by his wife for a full half hour;

(4) to permit plaintiff Casson his right to visit with his wife;

(5) to turn off the lights in the cells in which plaintiffs Casson, Shakur, Tabor, Squires and Johnson are incarcerated during the night-time hours; and

(6) to cease and desist from visiting any punishment on all plaintiffs herein prior to trial.

B. That damages be awarded to plaintiffs in the sum of $100,000 each, with the exception of plaintiff Lee Berry, where actual and punitive damages are demanded in the amount of $500,000, for grossly abusive physical and psychological treatment inflicted upon all plaintiffs while incarcerated, in violation of their rights to be free from cruel and unusual punishment and to due process of the law and equal protection of the law, which rights have been secured to plaintiffs by the Eighth and Fourteenth Amendments to the United States Constitution.

C. For such other and further relief as this Court deems just and proper.

Dated: New York, New York, December 1, 1969.

s/ Gerald B. Lefcourt
GERALD LEFCOURT
FREDERICK H. CORN
WILLIAM E. CRAIN
WILLIAM M. KUNSTLER
ARTHUR TURCO
SANFORD M. KATZ
Attorneys for Plaintiffs

Writ of Habeas Corpus, Ex Rel., Gerald B. Lefcourt, on Behalf of Lee Berry.

SUPREME COURT
COUNTY OF NEW YORK

THE STATE OF NEW YORK ex rel. GERALD B. LEFCOURT on behalf of LEE BERRY,

Petitioner,

v.

GEORGE F. MCGRATH, COMMISSIONER OF CORRECTION, CITY OF NEW YORK,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of their attorneys, GERALD B. LEFCOURT, SANFORD M. KATZ, FREDERICK H. COHN, WILLIAM E. CRAIN, ARTHUR F. TURCO, and WILLIAM M. KUNSTLER.

TO COMMISSIONER OF CORRECTION, GEORGE F. MCGRATH,

Greeting:

WE COMMAND YOU, that you have and produce the body of LEE BERRY, by you imprisoned and detained, as it is said, together with your full return to this writ and the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged before a Justice of the Supreme Court, Trial Term Part (31) at 100 Centre Street, New York, New York, in the courthouse thereof on the 1st day of October, at 9:30 o'clock in the forenoon, to do and receive what shall then and there be considered concerning the said persons and have you then and there this writ.

WITNESS, HON. SAMUEL A. SPIEGEL, one of the judges of our said Court, the day of October, 1969.

NORMAN GOODMAN
Clerk

LEFCOURT, KATZ, COHN, CRAIN, TURCO and KUNSTLER
37 Union Square West
New York, New York 10003

The within writ is hereby allowed this 26th day of September, 1969.

SAMUEL A. SPIEGEL
J. S. C.

Petition for a Writ of Habeas Corpus, Ex Rel., Lee Berry.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK, PART XXX

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LEE BERRY,
Petitioner,

against

GEORGE F. MCGRATH, COMMISSIONER OF CORRECTION,
CITY OF NEW YORK,
Respondent.

TO THE JUDGES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

Petition for a Writ of Habeas Corpus, Ex Rel., Lee Berry.

Relator, by his attorneys, respectfully petitions this Court for a writ of habeas corpus. In support thereof, relator alleges as follows:

1. Relator is presently unlawfully detained by respondent at the Men's House of Detention, Borough of Manhattan, 125 White Street, New York, New York.

2. Upon information and belief, relator, a member of the Black Panther Party for Self Defense, is charged, with some twenty other persons, of, *inter alia*, a conspiracy to blow up five New York department stores, a police precinct and the right-of-way of the Penn-Central Railroad.

3. Relator, who was arrested in a Veterans' Hospital where, as an honorably discharged veteran, he was receiving treatment as an epileptic subject to *grand mal* seizures, must, in order to prevent such convulsions, take certain drugs such as phenobarbital and dilantin, both of which have a certain depressant effect on the patient concerned.

4. At approximately 3:00 p.m. on July 23, 1969, while relator, who was under the influence of the above medication, was lying on his bunk in Cell No. Lower F-2, Tenth Floor, Manhattan Men's House of Detention, an institution wholly under the direction and control of respondent, the Commissioner of Correction of the City of New York, a white Correction Officer, apparently wearing Shield No. 488, by the name of "John" Dieselhurst (phonetic spelling), entered said cell and ordered relator to "Get the fuck up!". When relator, who had been dozing, struggled to rise to his feet, said Dieselhurst drew out his blackjack and viciously struck him on his left temple, knocking him to the floor of the said cell and causing him to bleed profusely.

5. Relator, who was in a stunned and dazed condition, was then taken to the first floor of said Men's House of

Detention where the blood which now covered his head, face and shoulders was washed away. After being examined by a prison physician whose name he believes to be Dr. Spongood, he was accused of having threatened said Correction Officer Dieselhurst and punished therefor by being given five (5) days solitary confinement "in the hole" and having his visiting privileges cancelled for a like period of time.

6. On July 24, 1969, relator's wife spent the entire day waiting in the outer room at said Men's House of Detention for an opportunity to see her husband, after she had learned of his beating, obtaining just one brief glimpse of him when he was leaving the Counsel Room on the first floor thereof after a consultation with two of his attorneys.

7. The aforesaid attorneys, William M. Kunstler and Gerald B. Lefcourt, observed a marked abrasion on relator's left temple and the fact that he was in an obviously dazed and confused condition. However, he was able to relate to them the facts set forth above as to the assault upon him.

8. Upon information and belief, on September 19, 1969, relator was placed on twenty (20) days restrictions, a diet of "just tea" without food or water, and no visitors, because he was accused by a block Correction Officer by the name of "John" Batchelor, of calling him an "Uncle Tom". Relator contends that he merely said, "Leave me alone!" to a demand by the said correction officer that he "Shut up!".

9. Upon information and belief, the authoritarian character of the Men's House of Detention, as repeatedly demonstrated by the actions and mannerisms of those correction officers imposed with the duty of exercising control over the relator, requires a degree of regimental conduct

and immediate compliance to the dictates of correction officers, on the part of the relator, which because of the nature of his illness and the effects of treatment he is unable to give. The transition from the Veterans' Administration Hospital bed, under the constant medical care of doctors deeply familiar with his medical history and sympathetic to the nature of his illness, to the oppressive confinement—subject to base brutality—in the Men's House of Detention, can in no way be considered therapeutic.

10. On information and belief, in the Veterans' Administration Hospital, relator was kept to a strict diet, medication was given to minimize the possibility of *grand mal* seizures occurring, and tests were being taken to determine what different medications and/or therapy could best be introduced to limit the possibilities of self-inflicted injury or death itself. In contrast, the Men's House of Detention has responded to the relator's unique physical and mental requirements by denying relator medication until a court order was issued; by subjecting relator to vicious assaults; by imposing upon him the unnecessary discomfiture of a bed of springs without a mattress; by offering relator a diet—whenever food is offered—which he has demonstrated time and time again that he cannot digest; by depriving relator of his right to communicate with the outside world; and by a general continuation of cruel and unusual punishment in an attempt to break the morale and spirit of the relator. The relator is simply not fit to endure this type of treatment, which he is compelled to bear because in his dazed, mental state he cannot respond to the acute demands imposed upon him by the authoritarian character of the Men's House of Detention. And, this treatment will continue unless this Court intervenes.

11. Because of the conduct hereinbefore alleged, relator is being illegally, unlawfully and unconstitutionally de-

tained by respondent in total violation of his most fundamental rights under the Constitutions of the United States and the State of New York.

12. Relator has previously applied for the relief sought herein to this Court, where it was confirmed that "Habeas corpus is available as the necessary and practical remedy for an individual under indictment and incarcerated in lieu of bail pending trial who is subjected to cruel and unusual treatment occurring at a time and place and under circumstances giving rise to the inference that the treatment will continue or be repeated." Relator has also submitted applications for writs of habeas corpus in connection with his contention that the bail of $100,000.00 upon which he is presently being detained is exorbitant, unconscionable and unconstitutional. Other than the aforementioned sought for relief, no previous application for the relief requested herein has been made to this or any other court. A court or judge of the United States does not have exclusive jurisdiction to order his release.

13. Relator prays that a writ of habeas corpus issue to compel his release from detention or transfer to a hospital for the reasons set forth above and that his further detention by respondent will possibly result in his further injury or death, or that, in the alternative, an evidentiary hearing be scheduled upon the allegations contained herein so that he may prove them to this Court's satisfaction.

14. The reason that this application is verified by one of petitioner's attorneys rather than by himself is that he is presently confined as indicated above.

WHEREFORE, relator prays that the relief set forth above be granted and that, in the circumstances, this application be acted upon forthwith.

(Sworn to by Gerald Lefcourt on September 25, 1969.)

Affidavit of Dr. William Bronston.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART XXX

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. LEE BERRY,

Relator,

against

GEORGE F. MCGRATH, COMMISSIONER OF
CORRECTION, CITY OF NEW YORK,

Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DR. WILLIAM BRONSTON, being duly sworn, deposes and says:

1.) I am a physician, licensed by the State of New York, practicing general medicine and psychiatry at the Frantz Fanon Health Group, 408 West 154th Street, New York City, New York 10032.

2.) I examined Mr. Lee Berry on Friday, August 1st, 1969.

3.) As a result of this examination, I diagnosed Mr. Berry's affliction as a form of epilepsy, etiology as yet undetermined.

4.) At the time of the examination and thereafter, the patient had been subject to severe seizures and was in extremely poor health.

Affidavit of Dr. John W. V. Cordice, Jr.

5.) It is my strong recommendation, based upon an evaluation of both the patient and the inadequate medical regime which he is currently receiving, that he be hospitalized to effectuate further diagnostic and medical control of his illness, which endangers his life, as well as to evaluate and deal with the patient's general nutritional status.

6.) It is my opinion that the above cannot be done in his present confined state, and that delaying his hospitalization endangers his life.

(Sworn to by William Bronston on August 7th, 1969.)

Affidavit of Dr. John W. V. Cordice, Jr.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

AFFIDAVIT

I, Dr. John W. V. Cordice, Jr., being duly sworn, depose and say:

I am a licensed physician and surgeon in the State of New York registered to practice in the City of New York.

My professional background is as follows:

Graduate, New York University College of Medicine	1943
Internship at Harlem Hospital	Jan.-Oct. 1944
Served as Doctor in the U.S. Army ..	Oct. 1944-Jan. 1947
Residency in Pathology at Montefiore Hospital	Jan.-July 1947

Fellowship in Surgery at Harlem Hospital and Residency in Surgery at Harlem Hospital	1947-1952
Research Fellowship in Surgery at the Columbia College of Physicians and Surgeons	1949-1952
Foreign Assistant in Cardiovascular Surgery at the University of Paris	1955-1956
Resident Doctor in Chest Surgery at Downstate Medical Center	1956-1958
Clinical Assistant Professor of Surgery at Downstate Medical Center	1958-1963
Director of Thoracic and Vascular Surgery at Harlem Hospital	1963-1967
Private Practice with staff privileges at Columbus Hospital, Hillcrest and Terrace Heights Hospital and the Medical Arts Center General Hospital	1967 to Present
Chief Surgeon—Queens Medical Association	1968 to Present

My organizational affiliations are as follows:

I am a member of the American Medical Association, the National Medical Association, the American College of Surgeons, the Society of Thoracic Surgeons, the New York Academy of Medicine, a Diplomate of the American Board of Surgery and a Diplomate on the Board of Thoracic Surgery.

At the request of Attorney Gerald Lefcourt (patient's attorney), Mrs. Marva Berry (patient's wife) and the patient, I became a medical and surgical consultant to the patient, Lee Berry.

Affidavit of Dr. John W. V. Cordice, Jr.

I was first called in consultation to see the patient on January 10, 1970 while he was in the Intensive Care Unit of Bellevue Hospital and listed in critical condition following surgery the previous day for left iliofemoral thrombectomy.

The following report on the patient's medical history, present condition and prognosis is based upon several examinations of the patient conducted while he has been confined in the Prison Ward at Bellevue Hospital and the infirmary at Riker's Island, consultations with doctors at those institutions and examination of the patient's medical record.

Patient's Clinical History

The patient is an epileptic who developed his first attack in 1965 while serving as a medic in the United States Army in Germany. During his period of European service he also developed malaria for which he was successfully treated. He subsequently served in Vietnam but was honably released from the service in August of 1966 for medical reasons.

He continued under treatment for epileptiform seizures first at the St. Albans Naval Hospital and later at the Manhattan Veterans Administration Hospital. He suffers from grand mal epilepsy and is subject to the complications of sudden, uncontrollable periods of unconsciousness and convulsive seizures.

At the time of his arrest on April 3, 1969, patient was removed from the Manhattan Veterans Administration Hospital, where he was undergoing treatment for epilepsy, and imprisoned in the Tombs. An epileptic when subject to stress, fear and anxiety or fatigue is likely to have epileptiform attacks more frequently and of a more serious nature. The standard treatment for one in patient's condition is by daily dosage of anti-convulsant medication,

frequently Mysoline and Dilantin. While in the Tombs, his epileptiform seizures became more frequent and severe and apparently treatment was not maintained in adequate fashion. It is my opinion that inadequate treatment and the hostile environment at the Tombs contributed to the severity and frequency of patient's epileptic seizures. Patient was transferred by court order to Bellevue Hospital on November 24, 1969 where his epilepsy improved under therapy.

Early in December, 1969, the patient developed what was diagnosed as a toxic condition which is a constitutional effect resulting from some noxious drug or poison in the system (which is commonly manifested by chills, fever, prostration, sweating, etc.). At that time, it was interpreted by the medical staff at Bellevue that he was experiencing a toxic reaction to Dilantin and Mysoline—the medication which he had been given for epilepsy. This condition persisted through the month.

Late in December, the patient was diagnosed as having an "acute abdomen" (a condition of the abdomen manifested by pain, rigidity, vomiting, etc.). Exploratory abdominal surgery was performed on December 26, 1969, and what was diagnosed as "an acutely inflamed appendix" was removed. After the operation the pathologist found that the appendix had been normal.

In the post-operative period, he developed a pulmonary complication which was interpreted as pneumonia, which was very severe (characterized by coughing of blood and sputum, chills, high fever, sounds of rales in the chest, pain in the chest). The clinical course resembled a septicemia (characterized by the presence of bacteria in the blood stream). He was transferred to the intensive care unit where his condition was critical.

During this period (early January, 1970) he developed signs of iliofemoral thrombosis of his left leg (a clotting of

blood in the iliac and femoral veins of the groin area with an associated thrombophlebitis of said veins). This condition is particularly dangerous because the clot can embolize or travel to the lung, leading to serious and sometimes fatal complications. It is treated by anticoagulant therapy and, where necessary, surgical intervention. Surgery was performed on January 9, 1970 to remove the thrombosis. It was the day after surgery that I first saw the patient.

Immediately after removal of the thrombosis from his left iliofemoral vein area, he remained toxic and septic with positive blood cultures (bacteria in the blood), and for a time his overall condition was extremely critical. He gradually improved under massive antibiotic therapy, anticoagulant therapy, and general supportive care.

At this time he also developed symptoms and signs of a right lung abscess. It was evident that the original pulmonary complication, as well as perhaps the acute abdominal symptoms, related to development of iliofemoral thrombosis which embolized to the lung and set up the train of pulmonary pathology which we see at present. The cavitary process in his right lung partially evacuated itself with coughing and some dependent drainage. He was treated for his lung condition with antibiotic therapy and postural drainage. He was treated against recurrence of clotting from the thrombosis by anticoagulant therapy and showed gradual improvement of both conditions.

On March 11, 1970, he was transferred to the Riker's Island Prison Infirmary. No advance notice of this move appears to have been given to the patient or his attorneys. I was not notified about his transfer until contacted by his attorneys after it had taken place. I did not consider a transfer out of a hospital setting as advisable and believe the move was harmful to his medical condition.

Once a court order was obtained permitting me to see the patient at Riker's Island, I visited him on March 15, 1970

and twice again in the next few days. Apparently medical management had been discontinued shortly before his transfer to Riker's Island, and no therapy for the leg or lung condition was being administered at Riker's Island. No medical history or recommendations appear to have accompanied the patient from Bellevue. I saw the patient a total of three times during his stay at Riker's Island and physical examination indicated a deterioration of the pathological process in the left leg, with swelling, tenderness, positive Homans' sign (pain of calf muscle upon stretching of foot), low-grade fever, night sweats, continued cough and expectoration, and X-ray evidence of persisting cavitary lesions in his lower right lung field. I attributed the deterioration of the condition of the leg to the discontinuance of anticoagulant therapy and antibiotic therapy. Because the facility at Riker's Island was wholly inadquate to maintain laboratory controls for administration of anticoagulant therapy, he was returned to Bellevue Hospital Prison Ward on March 19, 1970, where he now remains on Ward I-1, under supervision of the surgical department.

Present Condition and Prognosis

I last visited and examined the patient on April 3, 1970. His condition is as follows:

Thrombophlebitis of the Left Leg—

Measurement of his lower leg extremities indicates approximately 1½ inch difference in the diameters of the calves, the left side being larger than the right, and approximately one inch difference in the diameters of the thighs, the left thigh being larger than the right. There is a positive Homans' sign on the left side, and palpation of the calf muscle and the anteromedial aspect of the

thigh elicited deep tenderness, suggestive of a continuing deep thrombophlebitis. There is a mild, two-plus, slightly brawny pitting edema, particularly over the lower leg and the dorsum of the foot on the left side. The pulses are of good quality; there are healed longitudinal scars in both femoral triangles, as well as a right paramedian lower abdominal scar (i.e., laparotomy scar). Temperature at this time is normal, but a leukocyte is not available, nor is a sedimentation rate available at this time.

This condition of deep vein phlebitis is serious and thrombosis continue to be threatened. The patient is now on Coumadin as the anticoagulant. The prognosis is guarded.

Lung Abscess

Breath sounds over the right lower lung field are diminished and although patient relates a persistent cough, expectoration apparently is minimal and has not been bloody for some time. X-rays of the chest were not available for examination at this time. There is a continuing problem with the management of the lung abcess. This abscess is a cavitary lesion, which while acute and apparently emptying itself, will have to be followed and treated adequately to prevent its becoming chronic or developing other complications. The prognosis at this time is guarded.

Epileptic Condition

Patient has experienced frequent and uncontrollable grand mal seizures and has a continuing problem with epilepsy and its control. He is presently receiving Dilantin and Mysoline as anti-convulsant therapy.

Affidavit of Dr. John W. V. Cordice, Jr.

Patient's Treatment Needs

The patient is in need of carefully controlled intensive medical therapy for the indefinite future for his several serious conditions. For his thrombophlebitis of the left leg, he requires continued anticoagulants and the monitoring of same on laboratory equipment. It is my opinion that anticoagulant therapy in this type of post-phlebitic leg may have to be maintained for many months—perhaps a year or more. He also should have specific antibiotic therapy aimed at the process in this leg after proper workup, cultures, etc. Such therapy is essential to minimize the chances of recurrence of thrombosis and embolization with the critical conditions that can follow.

For his lung condition, patient also required specific antibiotic therapy, after the proper laboratory controlled investigations. He also requires inhalation therapy, for the treatment of this condition.

For his epileptic condition, the patient requires continued dosages of anti-convulsant medication. Neurologic consultation should continue on a regular basis particularly with reference to adjustment and monitoring of anti-convulsant medication inasmuch as the patient is reported to have experienced exaggerated depression and toxicity following previous medication in the same dosage. The general treatment of the epileptic condition will have to be continued over many months or years.

These various conditions must be followed very closely and the treatment program supervised very closely. It is my view that to achieve the proper medical ends for this patient a well intergrated program of medical, surgical and neurologic therapy must be instituted and continued. In the management of a complicated case such as this, it is far preferable that the patient's medical care be under the continued supervision of one chief physician to whom specialty consultants are available. Patient's treatment up

to this time has, unfortunately, suffered from fragmentation and compartmentalization because of the type of institutional framework of the prisons and hospitals in which he has been confined. Such fragmented service cannot be deemed but detrimental in a case of this seriousness which requires a carefully integrated program. In my capacity as consultant in this case, I have been unable to fulfill the essential function of providing the integrated supervision that this patient requires, as I could only make suggestions to the staff at Bellevue. In addition, it has been extremely difficult to obtain the type of information that the proper following of this case requires—i.e., X-ray examinations, leukocyte count, sedimentation rate, etc., and communication has been extremely difficult.

It is my professional opinion that it is necessary in this patient's best medical interests that he be placed in a hospital in which he can have the type of centralized and intergrated medical program described above. In the interest of this patient's health, I therefore recommend that he be treated in a hospital where one chief physician or service has full and direct responsibility for his care and treatment. Of those hospitals with which I am affiliated, I would advise that this patient be placed in one of the General Surgical Wards of Columbus Hospital, 19th Street and Second Avenue, New York City, where his case would be under my direct supervision and responsibility and the medical program detailed above would be carried out.

(Sworn to by John W. V. Cordice, Jr. on April 6, 1970.)

Writ of Habeas Corpus, Ex Rel., Harold Rothwax on Behalf of Lee Berry.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Ex Rel.
HAROLD ROTHWAX on Behalf of LEE BERRY,

Petitioner,

v.

GEORGE F. MCGRATH, Commissioner of Correction of the Department of Correction of the City of New York.

To: George F. McGrath, Commissioner of Corrections of the City of New York.

GREETINGS:

We command you, that you have the body of Lee Berry, by you imprisoned and detained, as it is said, together with the full return to this writ and time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged before the Justice presiding in special term of the Supreme Court of the State of New York to be held at Bellevue Hospital Prison Ward, located at First Avenue and Thirtieth Street, New York, New York on the day of April, 1970, at o'clock in the forenoon of that day to do and receive what shall then and there be considered concerning them and you then and there have this Writ.

Writ of Habeas Corpus, Ex Rel., Harold Rothwax on Behalf of Lee Berry.

WITNESS: Hon. Justice one of the Justices of our said Court, this day of April, 1970.

By the Court

.....
CLERK

HAROLD J. ROTHWAX
Columbia University
School of Law

JACK GREENBERG
MICHAEL MELTSNER
JACK HIMMELSTEIN
JONATHAN SHAPIRO
ANN WAGNER
GERALD LEFCOURT
WILLIAM E. CRAIN
CAROL H. LEFCOURT

By: .....
Attorneys for Petitioner

The within Writ is hereby allowed this day of April, 1970.

.....
J. S. C.

Petition for Writ of Habeas Corpus, Ex Rel., Harold Rothwax, on Behalf of Lee Berry.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, EX REL.
HAROLD ROTHWAX on Behalf of LEE BERRY,

Petitioner,

v.

GEORGE F. MCGRATH, Commissioner of Correction of the Department of Correction of the City of New York.

TO: THE SUPREME COURT OF THE STATE OF NEW YORK:

Harold Rothwax, Esquire, a member of the Bar of the State of New York on behalf of petitioner Lee Berry respectfully alleges and shows to the Court:

(1) Petitioner herein is a defendant in the matter of *People of the State of New York* v. *Shakur, et al.*, Indictment No. 1848½-69. On February 2, 1970, the Honorable Justice Murtagh severed petitioner's case from that of thirteen (13) co-defendants for trial due to the grave condition of petitioner's health. No trial date has been set for petitioner, and no trial can be held in the foreseeable future, due to petitioner's health and other circumstances, as more fully appears herein.

(Custody)

(2) Petitioner is now illegally incarcerated in the prison ward of Bellevue Hospital under the supervision control

and management of respondent, George F. McGrath, Commissioner of the Department of Corrections of the City of New York. He has been incarcerated at various facilities under the supervision, control and management of respondent since April 3, 1969, and will remain so incarcerated indefinitely unless the relief sought herein is granted.

(Setting of Bail)

(3) A twelve count indictment handed down April 2, 1969, charged 21 persons, including petitioner with attempted murder, arson and attempted arson, possession of weapons and conspiracy. At the April 2, 1969 arraignment of 12 of the defendants, the District Attorney argued in the court of the arraignment of the first defendant that "it would be a menace to the community and a menace to society to admit this man to bail, and therefore we request that no bail be set." When Justice Marks noted that the petitioners were "entitled to some bail," the district attorney stated: "If Your Honor would have a figure to set bail, I would suggest $100,000." (Arraignment, April 2, 1969, New York County Supreme Court, Tr. 11.) After similarly setting bail for the second defendant, Justice Marks announced that all twelve of the defendants would be held on $100,000 bail subject to defense counsel's right to apply for a reduction. The district attorney presented no evidence or argument regarding risk of flight as to any of the twelve defendants. On April 3, 1969, Justice Marks, again without any evidence regarding risk of flight, set $100,000 bail for Lonnie Epps, a 17-year-old high school student with no prior record who had voluntarily surrendered himself. (Arraignment, April 3, 1969, New York County Supreme Court.)

Petition for Writ of Habeas Corpus, Ex Rel., Harold Rothwax, on Behalf of Lee Berry.

On April 3, 1969, after petitioner had personally informed the police that he was a patient at the Veterans Administration Hospital, petitioner was taken into custody and bail was set for petitioner at $100,000 by Judge Marks. Petitioner was not represented by counsel at this hearing as counsel for petitioner was not given notice of the arraignment.

(Prior Applications for Reduction of Bail)

(4) Prior to the issuance of a superseding indictment in this case on November 17, 1969 and prior to petitioner's case being severed from those of his co-defendants on February 2, 1970, the following actions for reduction of bail were brought generally on behalf of all the co-defendants, including petitioner. No previous application for the relief sought herein has been made on the basis of the present circumstances shown by this petition, including petitioner's present medical condition, his opportunity if released to obtain superior medical treatment at a facility of his choice, and his detention with no reasonable expectation of trial within the foreseeable future.

On April 11, 1969, all those under indictment sought a reduction of bail before Justice Marks, alleging that their bail of $100,000 for each defendant was exorbitant, unreasonable and unconstitutional. Petitioners in that action, who were being held in seven different jails in four different boroughs were denied their requests to appear and to have an evidentiary hearing on the bail issue. The district attorney presented no evidence or argument regarding risk of flight, but instead alleged that a pipe bomb had been found in the possession of some of the defendants others than petitioner. All defendants' bails were maintained at the original level of $100,000 with the exception of Eddie

Josephs and Lonnie Epps (both high school students), whose bails were reduced to $25,000 and $10,000 respectively.

The constitutionality of these bails was subsequently tested through various state courts and have remained substantially the same except for a reduction of $50,000 each for co-defendants Tabor and Squires by a Justice in Queens County Supreme Court, the locality of their detention.

On May 1, 1969, a writ of habeas corpus was sought in Part 31 of the Supreme Court, New York County, to test the constitutionality of bail for petitioner and five co-defendants. Other co-defendants sought similar relief in Bronx, Queens and Kings Counties where they were detained. On the return of the writ in Part 31 on May 1, 1969, counsel were informed by the Clerk that the hearing was moved to Part 30 where Justice Marks dismissed the writs on the ground that the petition was not properly verified.

Following the dismissal of the aforesaid writs of habeas corpus, additional petitions were again filed with the Supreme Court. These writs were brought on for a hearing before Justice John M. Murtagh heard argument on May 5, 1969 and reserved decision until May 16, 1969, when, without opinion or hearing, he dismissed all of the said writs. On Appeal, the Appellate Division, First Department, affirmed the denials below without opinion.

Petitioner and his co-defendants applied for a writ of habeas corpus in the United States District Court for the Southern District which was denied by the court in an opinion filed August 26, 1969 and reported at 303 F. Supp. 303 (1969). On September 15, 1969, the Second Circuit Court of Appeals granted a certificate of probable cause and, without receiving briefs on the merits, summarily affirmed the order below without prejudice to renewal of

petitioner's application if no trial date had been set within 30 days.

Subsequently, petitioners renewed their application to the Second Circut on the ground that no trial date had been set within the 30 days specified by the court. Before the Second Circuit ruled on this application a state judge set the case for trial on November 17, 1969. Thereafter, on October 24, 1969 the Second Circuit Court of Appeals summarily denied petitioners' renewal application on the ground that the case would be tried on November 17. The Supreme Court of the United States denied certiorari on March 23, 1970.

On November 17, 1969, however, a new 30 count indictment superseding the original indictment and naming an additional defendant was served. After the superseding indictment was handed down petitioners again applied to the United States District Court for habeas corpus relief. On December 1, 1969, this application was denied. *United States ex rel. Shakur* v. *Commissioner of Corrections*, No. 69 Civ. 5146 (S.D.N.Y.).

Petitioner was severed from the trial of his co-defendants on the first day of pre-trial hearings February 2, 1970, because the serious condition of his health made trial in the foreseeable future impossible. A motion for reduction of bail because of the delay in petitioner's trial brought about by the severance and his physical condition was made on his behalf on February 3, 1970. This motion was denied by Judge Murtagh on February 4, without opinion.

(Petitioner's History)

(5) Petitioner, Lee Berry, was born on January 16, 1946 in Brooklyn, New York and has lived in Brooklyn all of his life. At the time of his arrest, he resided with his wife, Marva, and daughter, Jemyl, at 169 Jamaica Avenue,

Brooklyn, New York. His mother, Elizabeth Berry, and sister, Grace Berry, live at 1260 Sutter Avenue, Brooklyn, New York. His father, Lee Berry, Sr., lives in Cleveland, Ohio.

After graduating from Franklin K. Lane High School, Brooklyn, in June 1963, petitioner worked for one year as a clerk at the Home Life Insurance Company in Brooklyn. In July, 1964, he entered the United States Army and became a dental specialist. While serving in the Army in Germany in 1965, he developed an epileptic condition. He was sent to Vietnam as a dental specialist towards the end of 1965. Shortly after his arrival in Vietnam he was hospitalized for epilepsy and remained hospitalized for the duration of his seven month stay in Vietnam.

He was eventually transferred to St. Albans Naval Hospital, Jamaica, and then to the Manhattan Veterans Administration Hospital. Because of his medical condition, he received an honorable discharge in August 1966.

After release from the Veterans Administration Hospital, petitioner was employed by the Equitable Savings Bank in Brooklyn as a teller but was forced to leave that job because of epileptic seizures, after six months. He then went to work as a dental technician but after one year his ill health also forced him to give up that job. During this period he attended Long Island University for one year and three months.

He now receives a $443.00 a month pension from the Veterans Administration based on 70% permanent disability due to his epilepsy. His epilepsy is a permanent condition which cannot be eliminated.

After his hospitalization in the Veterans Administration Hospital in 1966 until his arrest in April 1969, he received daily medication of three times a day each of Dilantin, Phenobarbital and Mesolin. This medication was pre-

scribed by doctors at the Veterans Administration Hospital in Manhattan and was received by Mr. Berry through prescription renewed on a month to month basis.

Petitioner has been associated with the Black Panther Party since the Fall of 1968 when together with three other persons he participated in a Theatre group of the Party and he also worked with the free breakfast distribution program.

(Petitioner's Prior Arrests)

(5) Petitioner has been arrested twice previously. In June 1967, petitioner Lee Berry and his brother Thomas Berry were arrested and charged with violating Section 1904 of the penal law (discharging of firearms into a public place and endangering others) and Section 435 of the New York City Administrative Code (unlawful discharge of firearms into a public place) and possession of a weapon. They were also charged with possessing narcotic drugs and possessing hypodermic instruments. Petitioner was released on $1,000 bail for the violations of Sections 1904 and 435 of the Penal Law and paroled on the narcotics charge. The case was adjourned repeatedly over the course of the next 20 months, with petitioner never failing to make a court appearance.

On February 18, 1969 petitioner was scheduled to reappear in the Criminal Court in the City of New York on the above charges, but on that morning his wife who was eight months pregnant fell and experienced severe pains in the abdomen. Petitioner rushed her to Downstate Medical Center where it was found that she was not in labor, and she was later released. The next morning, petitioner appeared before the court with a letter from a doctor of Downstate Medical Center attesting to the above facts and the court vacated a bench warrant which had been issued

the day before and ordered the bail forfeiture vacated. The matter was adjourned to April 21, 1969. On this latter date, petitioner was already incarcerated under the conspiracy indictment. On April 21, 1969 on motion of the District Attorney, the charges against Thomas Berry were dismissed. No further action has been taken regarding those charges against petitioner.

Petitioner was also arrested on November 26, 1968 after having been stopped for a traffic offense and found to be driving without a license. He was incarcerated at the Charles Street Precinct No. 6 overnight and charged with forgery in the second degree on the basis of the police officer having allegedly found in petitioner's possession a driver's license belonging to a person other than petitioner. He was released on parole. An appearance was apparently scheduled for January 27, 1969. Petitioner, however, had no knowledge that he was required to be in court on that date and failed to appear. Petitioner's failure to appear at the hearing on the driving charge was hardly indicative of other than inadvertence as petitioner on the following day, January 28, 1969 and subsequently, did appear in court on the firearms and narcotics charges.

Petitioner has never been convicted of any crime and has never been arrested for any other crime than those described above.

(Petitioner's Medical Condition and Treatment While In Custody)

(6) On April 1, 1969, petitioner entered the Manhattan Veterans Administration Hospital to receive treatment for his epileptic condition, which had developed in 1965 while he was serving in the Army. Since his release from the Army in 1966, he had been receiving treatment for

epilepsy at this facility and had until his arrest been on prescription medication of three daily doses each of Phenobarbital, Dilantin, and Mysoline.

On April 3, 1969, after indictment naming petitioner had been returned by a grand jury of New York County, petitioner was notified by his mother that the police were looking for him. He called the police and told them where he was. The police arrived shortly, told the head doctor on petitioner's ward that petitioner was "an arsonist, murderer and Black Panther" and had to be removed from the hospital, and petitioner was put in the Tombs.

Petitioner was held for several months at the Tombs since he was unable to make the $100,000 bail set on April 3, 1969. At the Tombs, he regularly requested medication from the guards for his epilepsy and requested to see a doctor, but the requests were refused. Subsequent to a court order obtained by his attorney in July 1969, he was able to receive some limited medication but his condition continued to deteriorate. During this period he regularly suffered epileptic seizures on the average of twice a week. Several times he awoke in a pool of blood from these seizures. Nevertheless, he was physically abused by prison guards.

On Sunday, July 22, 1969, petitioner had an extremely bad seizure. Monday morning a doctor came to see him and gave him 6 tranquilizing pills. At approximately 2:00 p.m., he fell asleep and he did not awake for the 4:00 p.m. head count. A guard at the Tombs, whose name on informaton and belief petitioner alleges to be John Dieselhurst, Badge No. 488, entered the cell and shook him and apparently pulled at his clothes. Petitioner was in a stupor induced by the drugs and did not awake. The guard hit him on his head on his left temple with a blackjack. Petitioner fell to the floor, a wound opened, and petitioner was quickly covered in blood. After being offered only a band-

aid for the wound, he was put in the "bin" as a punishment for refusing to answer roll call. The "bin" is a solitary cell with only a toilet and toilet tissue and nothing else. His shoes and socks were taken from him. He had no blanket, no medication, no washing facilities whatsoever. The light was left on at all times and there was no ventilation or window to the outside. It was exeremely hot. During the five days he was in the "bin" he was offered only bread and tea to eat. He believes that the wound continued to bleed for two days and then closed on its own. A scar remains from that wound.

On release, he was returned to a standard cell on the 9th floor of the Tombs. His medication was no longer given regularly; rather he received one or the other of the pills once every few days. During the period from August through November his seizures continued at the rate of twice a week.

On November 24, 1969 pursuant to a Supreme Court order he was transferred to the prison ward at Bellevue Hospital. Shortly after his arrival at Bellevue, he developed a high fever, became very sick and unable to move. He was given heavy dosages of drugs and recalls little of the next three weeks, except that he was confined to bed for the entire time and was in a semi-conscious or semi-comatose state.

On December 25th, he developed severe cramps in the abdomen and was operated on December 26th. His appendix was removed but later examination by the pathologist determined nothing had been wrong with his appendix.

During the post-operative period he was treated for what appeared to be a severe pneumonia and his condition was critical. He was then found to have developed signs of iliofemoral thrombosis which is a clotting of blood in the blood vessels of the groin area. This condition was described by Dr. John Cordice, who has been appointed

as medical consultant in this case and whose affidavit is attached as Exhibit A, as "particularly dangerous because the clotted material can easily embolize or travel to different parts of the body such as the lung, leading to serious and sometimes fatal complications." He was operated on on January 9, 1970 for correction of this condition. Later in January, he was found to have developed a hole or abscess in the lung, which condition continues at this time.

It was at this time that Dr. John Cordice, a Board Certified Surgeon was, at petitioner's request appointed as a medical consultant to this case. Dr. Cordice concluded from his examination of defendant at that time that "it was evident that the original pulmonary complication as well as perhaps the acute abdominal symptoms related to development of iliofemoral thrombosis which embolized to the lung . . ." Since that time Dr. Cordice has seen the patient on several occasions, consulted with the doctors at the institutions in which petitioner has been incarcerated and has examined petitioner's medical records, although he has no authority over the quality of care, character of medication or treatment facilities accorded petitioner other than as a result of his persuasive powers and recommendations to physicians and other authorities in the employ of the institution in which petitioner has been incarcerated.

On March 11, 1970 without advance notice to petitioner, his counsel or Dr. Cordice, Berry was transferred to the Riker's Island Prison facility where he was lodged in the infirmary. No medical reports accompanied his transfer and all medication was apparently discontinued. After petitioner's attorneys learned of the transfer and as soon as a new court order could be obtained, Dr. Cordice went to Riker's Island to examine petitioner. Dr. Cordice found

a "deterioration" of the condition in petitioner's left leg which required anti-coagulant therapy and the type of medical services that only a hospital could provide.

On March 18, 1970, Dr. Cordice met with Doctors Mooney and Sherman at the Riker's Island facility, and they agreed that anti-coagulant treatment was essential and that petitioner should be transferred back to Bellevue. On March 19, 1970 petitioner was returned to Bellevue Hospital Prison Ward where he is presently held.

The condition of his lung abscess, thrombophlebitis of the leg and epilepsy remain serious and the prognosis guarded.

(Petitioner's Required Treatment)

(7) Petitioner is suffering from several serious illnesses, symptoms and by-products of which require the very best medical care and treatment if he is to survive. Petitioner's health has deteriorated steadily in the year that he has been in custody. His treatment at the Tombs, Bellevue Hospital and Riker's Island have all contributed to the deterioration of his condition and the medical complications that have arisen in this case. The foregoing is plainly demonstrated by the affidavit of Dr. Cordice attached hereto.

Dr. Cordice's memorandum outlines the specific medical needs for the adequate treatment of the patient over the next months or possibly even years and sets forth the difficulties with continued long-term medical management of petitioner's case at Bellevue Hospital. He concludes that

> The patient is in need of carefully controlled intensive medical therapy for the indefinite future for his several serious conditions . . . [T]o achieve the

> proper medical ends for this patient a well integrated program of medical, surgical and neurologic therapy must be instituted and continued. In the management of a complicated case such as this it is far preferable that the patient's medical care be under the continued supervision of one chief physician to whom specialty consultants are available . . . In the interest of this patient's health, I therefore recommend that he be treated in a hospital where one chief physician or service has full and direct responsibility of his care and treatment.

With the assistance of Dr. Cordice, petitioner's attorneys have contacted two hospitals in the metropolitan New York area which have agreed to admit petitioner as a patient for the long-term closely supervised treatment which he so sorely needs, without cost to him or to the City of New York, if he were to be released on parole or his bail set at a reasonable figure which he could provide as security.

(a) Columbus Hospital is located at 19th Street and Second Avenue. Petitioner would be placed on the Surgical Ward and his case would be under the direct supervision and responsibility of Dr. Cordice who is affiliated with that hospital. All the medical specialties and consultants would be available and coordinated through Dr. Cordice's supervision of the case.

(b) New York Hospital Medical Center is located at 68th St. and York Ave. Petitioner would be a Pavilion Patient on Ward G2 (a Medical Ward) and under the direct supervision of physicians on the Medical Staff of the hospital.

(Additional Circumstances Related to the Reduction of Petitioner's Bail)

(8) Petitioner is presently held on $100,000 bail, an amount which he cannot hope to raise due to his health and indigency. Such amount is not only unreasonable and unconstitutional as appears from Paragraph 9 *infra*, but is totally unnecessary. Petitioner's medical condition makes it totally impossible for him to flee the jurisdiction or be of danger to the community. Even if his health were of the very best, petitioner's roots in the community, his financial situation, his family relationships and other circumstances as alleged herein make it unlikely that he would flee the community or be of danger sufficient to be held on $100,000 bail. As the matter stands, however, holding petitioner in a prison ward of an over-crowded hospital, transferring him back and forth between correctional facilities and holding him on $100,000 bail when superior medical facilities are available to him if bail were reduced, amounts to the grossest cruelty and seriously endangers his health.

Petitioner's severance from co-defendant's trial on February 2, 1970, presents another reason why the relief sought herein should be granted. The severance was in recognition of the fact that petitioner's health makes it totally impossible for him to be tried within the foreseeable future. Over a month of pre-trial motions have been held in the case of his co-defendants, making it unlikely that even if his health were to undergo some miraculous change that he could be tried along with them or until their long and complicated trial which is presently scheduled to resume on April 7, 1970 is concluded.

Indeed, the state has no intention of trying petitioner until this trial is completed as demonstrated by the fact that on March 16, 1970 the Honorable Justice Grumet sitting in Part 31 of the Supreme Court denied the motions of two other severed co-defendants, Lonnie Epps and Eddie Josephs for trial date on the basis of the pendency of trial proceedings before Justice Murtagh.

(9) Petitioner's detention by respondent violates the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States in that (a) although his health makes it extremely unlikely, if not impossible, for him to flee the jurisdiction or being of danger to the community, he is denied pre-trial liberty; (b) solely on account of his poverty he is denied pre-trial liberty; (c) he is denied fundamental fairness by being punished, imprisoned and presumed guilty before he has been tried and despite the fact that a trial date is unlikely to be set in the foreseeable future; (d) his present detention denies him necessary medical services under the care and custody of the doctor of his choice in the facility of his choice; (e) he is denied procedural fairness because detention adversely affects his health, disposition of his case, deprives him of a fair trial; (f) his right to bail which is not excessive is denied because such right must be read consistent to the Constitution of the United States to prohibit bail in excess of what petitioner can afford; (g) his right to bail which is not excessive is denied in that his bail has been set without consideration of individual circumstances which establish the probability of his appearance at trial; (h) detention of petitioner on bail far higher than usual is not justified by the State of New York based on his individual circumstances; (i) detention of petition given his health and no reasonable likelihood of a speedy trial amounts to cruel and unusual punishment; (j) such prolonged pre-trial incarceration resulting solely from ill health is a denial of due process of law.

Due to poverty, petitioner is unable to pay the cost or fees of this proceeding for writ of habeas corpus or to get security therefore, not withstanding he believes he is entitled to redress.

Petition for Writ of Habeas Corpus, Ex Rel., Harold Rothwax, on Behalf of Lee Berry.

WHEREFORE, petitioner prays the court as follows:

(a) That petitioner be permitted to file this petition to proceed in this court in forma pauperis.

(b) That a writ of habeas corpus issue forthwith directed to respondent requiring him to produce the body of petitioner.

(c) That petitioner forthwith be released on parole or a maximum of $5,000 bail pending disposition of the proceeding.

(d) That petitioner thereafter be released on parole or a maximum of $5,000 bail after a full and complete hearing.

(e) That the court grant petitioner such other and further relief as the court may from time to time find just and appropriate for the protection of his rights.

Dated: New York County
New York, April , 1970

HAROLD ROTHWAX

Sworn to before me this
day of April, 1970.

.....
Notary Public

Notice of Motion, July 10, 1970.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jonathan Shapiro, one of the attorneys for plaintiffs, duly sworn to on the 10th day of July, 1970; the Memorandum of Points and Authorities submitted herewith; and upon all papers and proceedings heretofore filed or had herein; the undersigned will move this Court at a Motion Term thereof, to be held in Room , United States Courthouse, Foley Square, New York, New York on the 21st day of July, 1970 at 10:00 a.m. of that day or as soon thereafter as counsel can be heard for leave to add as additional parties defendants, pursuant to Rule 21 of the Federal Rules of Civil Procedure, the following persons:

1. Pasquale A. Cafaro, former warden, Manhattan House of Detention for Men, individually and in his official capacity;

2. Angelo Accocella, present Deputy Warden in Command, Bellevue Hospital Prison Ward, individually and in his official capacity;

3. Anthony Principe, Director of Operations, Department of Corrections, individually and in his official capacity;

4. Frederick C. Rieber, Deputy Commissioner of Corrections, individually and in his official capacity;

5. Ralph V. Plew, M.D., Deputy Medical Director, Department of Corrections, individually and in his official capacity;

5. Ralph V. Plew, M.D., Deputy Director, Department of Corrections, individually and in his official capacity;

6. John Dieselhurst, Corrections Officer, Manhattan House of Detention, Shield No. 488, individually and in his official capacity;

7. Dr. "John" Collins, M.D., Medical Staff, Manhattan House of Detention, whose first name is otherwise unknown to the plaintiffs, and whose true first name, when ascertained, will be added by amendment, individually and in his official capacity; and

8. The State of New York and to amend the complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure in the following respects:

(1) To add the following to paragraph 17(d):

> The physician who examined Berry after he was beaten offered him only a band-aid for his wound. This treatment, manifestly inadequate, was the only medical care given to Berry. The wound he received continued to bleed for two days while he was "in the hole;"

(2) To replace present paragraph 17(h) with the following:

> The medical treatment and medication which plaintiff Berry received for his epilepsy and related ailments while he was incarcerated at the Manhattan House of Detention was inadequate. Because of this, Berry's medical problems were complicated unnecessarily and his health degenerated. Plaintiff sought habeas corpus relief in July 1969, seeking an order transferring him to the Bellevue Medical Center prison ward. After a long series of applications, affidavits, court appearances and medical examinations, plaintiff

Berry was finally transferred to Bellevue for treatment on November 21, 1969. Shortly after his arrival at Bellevue, plaintiff became very sick. Because the quality of the medical care and the character of the medication given him at Bellevue was inadequate, his epileptic condition deteriorated and he developed other complications as well. On March 11, 1970, without advance notice to plaintiff, he was transferred from Bellevue to Riker's Island prison facility, where he was lodged in the infirmary. No medical reports accompanied his transfer and all medication was discontinued. As a result of this transfer and the consequential termination of hospital care, plaintiff's health worsened considerably. On March 19th, upon the recommendation of his private physician, Dr. John W. V. Cordice, plaintiff was returned to Bellevue Hospital Prison Ward.

(3) To add, as paragraph 20, the following:

The beating of plaintiff Lee Berry by defendant John Dieselhurst which took place at the Manhattan House of Detention on or about July 22, 1969, described in paragraph 17(c), above, was done with malicious intent and without reasonable cause, and constituted an illegal assault and battery under the common law of New York and a violation of said plaintiff's right not to be subjected to summary punishment and deprived of personal security without due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. Plaintiff Berry seeks damages herein for the violation of his rights under both state and federal law. This Court has pendent jurisdiction of the claim arising under New York law.

Notice of Motion, July 10, 1970.

(4) To add, as paragraph 21, the following:

Defendants' failure to provide plaintiff Lee Berry with adequate medical attention and care while he was incarcerated at the Manhattan House of Detention for Men and the Bellevue Hospital Prison Ward constituted negligence under New York state common law and was in disregard of their statutorily-imposed duty to "protect the health of . . . inmates." New York State Correction Law § 46(5). In addititon, said deprivation of medical care constituted a violation of plaintiff's right not to be subjected to cruel and unusual punishment and to equal protection of the laws as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. For the violation of his rights under state and federal law, the defendants State of New York, George F. McGrath, Angelo Accocella, Pasquale A. Cafaro, and Dr. "John" Collins are jointly and severally liable in damages to plaintiff Lee Berry. This Court has pendent jurisdiction of plaintiff's claim arising under New York law against the above-named defendants for negligent failure to provide adequate medical care.

Dated: New York, New York, July 10, 1970.

Yours, etc.,

JONATHAN SHAPIRO
JACK GREENBERG
JONATHAN SHAPIRO
MARGARET BURNHAM
GERALD B. LEFCOURT

SANFORD M. KATZ
Attorneys for Plaintiffs

Affidavit of Jonathan Shapiro.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JONATHAN SHAPIRO, being duly sworn, deposes and says:

I am one of the attorneys for the 13 plaintiffs herein, and make this affidavit in support of the motions for leave to add additional parties defendants and to amend the complaint.

This action, commenced by the filing of a complaint in October, 1969, is for injunctive relief and damages for violation of plaintiffs' rights under *inter alia*, the Eighth and Fourteenth Amendments to the United States Constitution. This suit arose out of plaintiffs' pre-trial incarceration under illegal conditions in seven detention centers throughout the City of New York. On December 16, 1969, plaintiffs moved for temporary injunctive relief. On January 26, 1970, United States District Court Judge Tyler entered an order granting in part plaintiffs' motion for temporary relief. No further proceedings have occurred since the entry of Judge Tyler's order.

Plaintiffs hereby seek to add the following persons as parties defendants:

(a) Pasquale A. Cafaro, former warden, Manhattan House of Detention for Men, individually and in his official capacity;

(b) Angelo Accocella, present Deputy Warden in Command, Bellevue Hospital Prison Ward, individually and in his official capacity;

(c) Anthony Principe, Director of Operations, Department of Corrections, individually and in his official capacity;

(d) Frederick C. Rieber, Deputy Commissioner of Corrections, individually and in his official capacity;

(e) Ralph V. Plew, M.D., Deputy Medical Director, Department of Corrections, individually and in his official capacity;

(f) John Dieselhurst, Corrections Officer, Manhattan House of Detention, Shield No. 488, individually and in his official capacity;

(g) Dr. "John" Collins, M.D., Medical Staff, Manhattan House of Detention, whose first name is otherwise unknown to the plaintiffs, and whose true first name, when ascertained, will be added by amendment, individually and in his official capacity; and

(h) The State of New York.

Proposed additional defendant Pasquale A. Cafaro was the warden in charge of the Manhattan House of Detention at the time plaintiff Lee Berry was incarcerated there. As such, proposed additional defendant Cafaro bears responsibility for the illegal denial of proper medical care to plaintiff Berry while plaintiff was an inmate at the Manhattan House of Detention.

Proposed additional defendant Angelo Accocella was the warden in charge of the Bellevue Hospital Prison Ward at the time plaintiff Lee Barry was incarcerated there. As such, proposed additional defendant is responsible for the lack of adequate medical care afforded plaintiff Berry while he was an inmate at the Bellevue Hospital Prison Ward.

Proposed additional defendants Anthony Principe and Frederick C. Rieber are, respectively, Director of Opera-

tions and Deputy Commissioner of the Department of Correction. As such, they are presently, and were at the time of the illegal acts complained of, responsible for the overall operations and supervision of the Department of Correction.

Proposed additional defendant Ralph V. Plew, is the Deputy Medical Director of the New York City Department of Correction, responsible for the medical care of inmates. As such, he is liable for the improper, illegally inadequate medical treatment afforded plaintiff Lee Berry while plaintiff was incarcerated in facilities of the Department of Correction.

Proposed additional defendant John Dieselhurst, is a correction officer at the Manhattan House of Detention. On or about July 22, 1969, John Dieselhurst, then a correction officer on duty, unconstitutionally and illegally beat plaintiff Lee Berry, who was, at the time, an inmate at the Manhattan House of Detention.

Proposed additional defendant Dr. "John" Collins is a staff physician at the Manhattan House of Detention. He purported to treat plaintiff Lee Berry on or about July 22, 1969, after plaintiff Berry had suffered a beating at the hands of proposed additional defendant John Dieselhurst. Dr. "John" Collins' treatment of plaintiff Lee Berry was superficial and inadequate, and denied him his constitutional right to proper medical treatment while incarcerated at the Manhattan House of Detention.

Under the rule of respondeat superior, the State of New York is liable for the negligent failure of its employees, namely defendant George F. McGrath and proposed additional defendants Angelo Accocella, Pasquale A. Cafaro, Ralph V. Plew, and Dr. "John" Collins, to provide adequate medical care to plaintiff Lee Berry while plaintiff was an inmate in facilities of the New York City Department of Correction.

Affidavit of Jonathan Shapiro.

On information and belief, all of the proposed additional defendants are citizens and residents of New York, are subject to the jurisdiction of this Court as to both service of process and venue, and can be made parties defendants herein without depriving the court of jurisdiction.

Further, plaintiffs hereby seek to amend the complaint. The changes sought to be made in paragraphs 17(d) and (h) are for the purpose of clarifying plaintiff Lee Berry's claim for damages based upon (1) the beating he suffered at the hands of a guard at the Manhattan House of Detention; (2) the inadequacy of the medical treatment provided him after said beating; and (3) the improper medical treatment afforded him for his epilepsy and other illnesses during the period of his pre-trial incarceration.

In addition, plaintiffs seek to amend in order to add to paragraph 17(h) facts which developed subsequent to the filing of the original and amended complaints.

And finally, leave is requested to add new paragraphs 20 and 21 to the complaint. Paragraph 20 adds a claim for relief, arising under state and federal law, for the beating of plaintiff Berry. Proposed additional paragraph 21 adds a claim for the deprivation of medical care to plaintiff Berry. This Court has pendent jurisdiction over the claims for relief set out in paragraphs 20 and 21 which arise under state law.

(Sworn to by Jonathan Shapiro on July 10, 1970.)

Copy received 1/16/75
A. Wright